92-635

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

LAWRENCE E. WALSH,

Petitioner,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the Contract Clause of the United States Constitution protect retirement benefits of California legislators explicitly granted under the state pension statutes after services have been rendered, and where the California Supreme Court had for 75 years characterized California public pension rights as protected contractual obligations under the federal Constitution?

Do the Contract Clause, Due Process Clause and Equal Protection Clause of the United States Constitution protect specific retirement rights among an employee's bundle of retirement benefits from total abrogation and elimination by a strained, convoluted and contrived interpretation of the word "limit"?

Do the Contract Clause, Due Process Clause and Equal Protection Clause of the United States Constitution protect beneficiaries from the bad faith and unfair dealing of the trustee administering a defined benefit public retirement system?

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In The

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LAWRENCE E. WALSH,

Petitioner,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lawrence E. Walsh prays that this Court issue a writ of certiorari to the Court of Appeal of the State of California Third Appellate District ("Court of Appeal") to review the opinion and judgment of that court entered on March 13, 1992.

OPINIONS BELOW

The order of the California Supreme Court denying review is not reported and is reprinted at Appendix (hereafter App.) 45. The Order of the Court of Appeal denying a rehearing is reprinted at App. 44. The Court of

Appeal held that a public employee's basic pension benefits are not vested contractual rights protected by the federal Contract Clause based on Art. IV, § 4 of the California Constitution. The opinion was reported at 4 Cal.App.4th 682, 6 Cal.Rptr.2 118, and is reprinted at App. 1. The Statement and Order of the California Superior Court ("the trial court") is unreported and appears at App. 46 holding that although petitioner met the requirements for pension benefits under former §§ 9359.01 and 9359.04, their repeal a few weeks before petitioner's retirement, and subsequent denial of reapportionment pension benefits, did not violate the federal constitutional prohibition against impairment of contractual obligations. The judgment of the trial court rendered at the conclusion of trial is not reported and appears at App. 74. The Decision of the Board of Administration holding that the petitioner was not entitled to retirement benefits under former §§ 9359.01 or 9359.04, or the doctrine of estoppel is not reported and appears at App. 77. The Dissenting Opinion by three Board Members held that petitioner Walsh was denied a vested early retirement benefit by the repeal of §§ 9359.01 and 9359.04 in violation of the contract clauses in the federal and state Constitutions and is not reported. It appears at App. 89. The Dissent also held that the Board had over stretched the meaning of the word "limit" which resulted in the "elimination" of a retirement benefit (App. 94).

JURISDICTION

The Court of Appeal entered its opinion on March 13, 1992 and entered its order denying rehearing on April 11, 1992. The California Supreme Court entered its order

denying review on June 11, 1992. On September 3, 1992, Justice O'Connor extended until October 9, 1992, petitioner's time for filing a petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 10, cl. 1: "No State shall pass any . . . Law impairing the Obligation of Contracts . . . "

United States Constitution, Amendment V: " . . . nor be deprived of . . . liberty, or property, without due process of law . . . "

United States Constitution, Amendment XIV, § 1: " . . . nor shall any State deprive any person of . . . liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Art. IV, § 4:

> " . . . The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967."

California Statutes: Pertinent parts of the Legislators' Retirement Law ("LRL"), California Government Code (all further references are to the California Government Code unless otherwise stated) §§ 9350, et seq. are set forth in the Appendix: .

> Sections 9358 and 9358.1 added in 1947; 9359.01, added 1965, repealed in Extraordinary Session October 7, 1974 as an urgency statute; 9359.04

added in 1971, repealed in Extraordinary Session October 7, 1974 as an urgency statute; 9359.16 added in 1961; 9359.18 added 1972; 9360.7 added in 1961 and amended 1974; 9360.10 added 1966; and 9360.11 added 1974.

STATEMENT OF THE CASE

In 1947 the LRL established a Legislators' Retirement System (hereafter "LRS"), a defined benefit plan, under the general administrative authority of respondent Public Employees' Retirement System (hereafter PERS). (§§ 9350.2, 9350.3, 9353.) Any Legislator could file an election to participate. (§ 9355.) Members could not participate in any other retirement system. (§ 9355.5.) The Controller was required to deduct 4% for members first elected before March 4, 1972 from any member's paycheck as a contribution to the System and forward that sum to PERS for deposit in the Legislators' Retirement Fund in the State Treasury. (§§ 9354, 9357, 9357.01, 9357.15.) From its inception, the State also made substantial contributions to the Retirement Fund.

At the adoption of the LRL in 1947 § 9358 required the State to pay into the retirement fund the estimated difference between accumulated contributions and benefits to be paid out each year. State contributions in the annual budget act did not constitute appropriations under § 9358.1. Sec. 9358.5 added in 1972 required that the LRS be fully funded and actuarially sound. These three sections were repealed in 1977 and were replaced by § 9358 which provided for monthly appropriations to the Legislators' Retirement Fund pursuant to a specific formula for the state's annual employer contribution.

Under LRL the board of administration has the exclusive control of the administration and investment of the fund with the same powers and duties applicable to the administration and investment of the Public Employees' Retirement Fund. Sec. 9354.1 originally enacted in 1947 provided that:

> " . . . All of the provisions of the Public Employees' Retirement Law applicable to the administration, investment, and custody of the Public Employees' Retirement Fund are hereby made applicable to the Legislators' Retirement Fund, to the same extent and with the same effect as if the Legislators' Retirement Fund were expressly mentioned therein."

Sec. 20757 was adopted in 1945 prior to the enactment of LRS and is still in full force and effect. It provides that all payments required to be made by the State to the Retirement Fund are continuing obligations of the State. Since there was no provision comparable to § 20757 in the LRL, and it is not in conflict with any provision of the LRL, all payments required by the LRL to be made by the State to the Fund were continuing obligations of the State.

Sec. 9359.01 (App. 99-100) was added to the LRL in 1965 which permitted retirement of a legislator at any age with four or more years of service if retirement was under conditions of reapportionment at the conclusion of the term.

On November 8, 1966, Art. IV, § 4 of the California Constitution was adopted. It states in pertinent part:

> " . . . The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967."

Sec. 9359.04 (App. 112-113) was added to the LRL in 1971 which provided an "In lieu" retirement under conditions of reapportionment during the term or at a later date.

Both §§ 9359.01 and 9359.04 were repealed at a tumultuous special session of the Legislature September 30 – October 2, 1974, in Assembly Bill 7 (hereafter AB-7), and signed into law October 7, 1974 as an urgency statute effective that date. Sec. 9360.11 was added to the LRL as the second § 8 in AB-7.

Petitioner Lawrence E. Walsh was elected to the State Senate in 1966 for a term of office from January, 1967 to January 1971. He immediately chose to become a member of the Legislators' Retirement System, assuming its burdens and anticipating its benefits. He was reelected November, 1970 for a term from January, 1971 to January, 1975. The term was subsequently changed to terminate December 2, 1974. His senatorial district was reapportioned during his second term, and based on his eligibility for early retirement due to reapportionment, he chose not to seek re-election for a third term so did not file to run as required on or before March 4, 1974.

PERS advised petitioner by letter dated September 12, 1974, that he would receive $510.40 per month when he retired at the end of his current term. He would be entitled to medical and health benefits because he had served eight years as well as an annual cost of living increase pursuant to § 9360.10 from the date of his retirement.

On September 30, 1974, petitioner had his application to retire hand delivered (and acknowledged received that day by PERS) to Mr. William Payne, Executive Officer of the Public Employees' Retirement System. The letter

applied for retirement pursuant to § 9359.01 at the conclusion of his term.

During petitioner's 8 years of service, PERS published an *Annual Financial Report and Report of Operations*. It always included a summary of membership and benefit coverages, as well as the LRL and financial report. At no time during Walsh's eight years did it include California Constitution art. IV, § 4 within the law nor the summary. The one sentence of the article with which we are concerned was the only part of article IV that was never enacted by the Legislature as a part of the LRL.

It is agreed that petitioner met the requirements for early retirement due to reapportionment if sections 9359.01 and 9359.04 had not been repealed. Prior to the effective date of their repeal, the last session of the legislature had adjourned. Petitioners duties were over. His application for retirement was filed with PERS September 30, 1974. He needed only to wait 55 days for his term to end. It is also agreed that had he been retired before the repeal of the statutes, their repeal would not have affected his retirement benefits. Legislative Counsel's Opinion #24347 said, "If the member had exercised those rights before that date," (October 7, 1974) "his retirement could not have been affected by the subsequent repeal of those sections (*Allen v. Board of Administration* 34 Cal.3rd 114, 120; *Abbott v. City of Los Angeles* (1958) 50 Ca1.2d 438; *Terry v. City of Berkeley*, 41 Ca1.2d 698, 703; *Lyon v. Flournoy* 271 Cal.App.2d 774."

Petitioner heard nothing from PERS from the date of his application for retirement until October 23, 1974. He was then notified PERS rejected his application because of the repeal of said sections. Prior to October 7, 1974, there had been no indication from PERS that any pending or proposed legislation would jeopardize his retirement,

nor had they given him any suggestions how to protect his retirement benefits.

PERS did not advise him that he could have appealed their determination at that time. They did write February 10, 1975, notifying him of steps to take to protect any rights to retirement benefits that may have vested prior to or subsequent to the repeal of § 9359.01. He sent such a statement February 24, 1975.

As he approached age 60 in September, 1986, PERS advised him he would be eligible to commence drawing benefits of $464 per month with cost of living adjustments from 1986. Under §§ 9359.01, 9359.04 or 9359.11 (added by AB-7) his monthly allowance would have been about double that amount after twelve years.

During the two terms that Petitioner served as senator commencing in 1967, except for the final 55 days, the LRL, among other benefits provided for early retirement if an officer's district was reapportioned after four years of service; additional benefits of § 9359.18; a cost of living increment from the date of early retirement; and medical and health care after his eight years of service.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEAL'S HOLDING THAT EARNED PENSION BENEFITS WERE NOT PROTECTED BY THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION IS CONTRARY TO LONG STANDING PRECEDENT OF THIS COURT AND THE CALIFORNIA SUPREME COURT

The holding of the Court of Appeal that public employees' retirement rights under the LRS are *NOT*

contractual; they are not *NOT* "vested"; and the earned pension rights of public officers after the called for service has been rendered are not under the protection of the Federal Constitutional Contract Clause is contrary to the long standing precedents of this Court as well as the California Supreme Court.

The applicable rule here is supplied by the case of *W. B. Worthen Co. v. Kavanaugh* (1935) 295 U.S. 56, 63. If the Contract Clause means anything at all, it means that California through its Public Employees' Retirement System can not constitutionally do what it tried to do to an employee on the verge of his retirement as in this case.

In cases involving state legislation affecting private contracts, the Supreme Court's decisions over the past half century consistently with both the constitutional text and its original understanding, have interpreted the Contract Clause as prohibiting state legislative Acts which, "[w]ith studied indifference to the interests of the [contracting party] or to his appropriate protection," effectively diminished or nullified the obligation due him under the terms of a contract. (*W. B. Worthen Co. v. Kavanaugh, supra,* 295 U.S. 56 at 60.)

The spurious issue raised by PERS and the Court of Appeal that the Legislature never intended that the LRS's rights were contractual rights because § 9358.1 provided that § 9358 was not an appropriation; that there had to be a specific funding mechanism at the establishment of a retirement system before pension rights were vested; and repeated inferences that a system had to be actuarially funded for rights to be vested jeopardizes public employees' retirement rights in many states including California. There is no authority for such a radical view of constitutionally protected contractual rights. Historically,

pension systems were established on a pay-as-you-go basis and were rarely placed on a reserve funding basis. Since Congress commenced its studies preparatory to the passage of the Employee Retirement Income Security Act of 1974 (ERISA), the trend has been toward improved funding practices in public systems as well as that now required in private systems.

In language directly applicable here, the California Supreme Court noted that " '[p]ension annuities . . . are in effect pay withheld to induce long-continued and faithful services.' " (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852, quoting *Giannettino v. McGoldrick* (1946) 295 N.Y. 208, 66 N.E. 57, 59.) "It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits, and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary." (*Kern, supra*, 29 Cal.2d at 856.)

If the Court of Appeal's decision is not reversed, retirement benefits held out by a governmental body have been, and will be, but a snare for the unwary. As vital as it is that our country have the brightest men and women in governmental positions, candidates who are in the midst of productive professional careers will not surrender their professional futures to enter a position with limited job security and uncertain retirement benefits. The public may suffer by losing competent, qualified persons in public service, whether as legislators, Constitutional officers, judges, teachers, or government employees generally.

Congress in enacting ERISA made detailed findings which recited in part, " 'that the continued well-being

and security of millions of employees and their dependents are directly affected by these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . 'ERISA § 2(a), 29 U.S.C. § 1001(a). . . . ' " (*Nachman Corp. v. Pension Benefit Guar. Corp.* (1980) 446 U.S. 359, 361-362.)

Congress wanted to correct this condition by making sure that if a worker had been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it. (*Id.* at pp. 374-375.)

During Congress' years of investigation preparatory to enacting ERISA, consideration was given to including public employees under its protection. Ultimately, that concept was rejected. Unlike a private employer, who may be quickly affected by adverse changes caused by any number of factors, and have to close his doors, a state, city, county, or district is not affected by such factors. It is assumed that a unit of government will last forever and probably grow forever, always in a position to levy more taxes to cover unfunded benefit costs, if any.

The Court of Appeal's invention of the requirement that a retirement system without a continuing appropriation provision precluded the establishment of vested contractual rights; and that the unfunded actuarial liability of a retirement system violated the debt limitation of the California Constitution is manifestly erroneous and palpably wrong. A similar debt limitation is contained in many other state Constitutions. Retirement benefits have consistently been held not to constitute such a debt (*Rochin v. State of Arizona,* 540 P.2d 643).

Although the people in the heat of a political campaign, and later the Court of Appeal, sought to impair earned pension benefits in a defined benefit system on the theory that the benefits were "extravagant" and "windfalls" sets a very dangerous precedent. Petitioner Walsh's pension of $510.40 in 1975 was a modest sum. Forgotten is the legal precedent that earned pension benefits are deferred compensation.

> "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."
>
> (Alexander Hamilton in III (John C.) Hamilton, History of the Republic of the United States (1859), p. 34, quoted in *United States v. Brown* (1965) 381 U.S. 437 at 444.)

A public officer is entitled to the protection of his earned pension benefits just as employees in the private sector. Congress has guaranteed protection for the latter, now the Court needs to protect the former. Petitioner was promised certain retirement benefits by §§ 9359 ' and 9359.04 under a defined pension benefit plan after fo r years of service. He served eight years and fulfilled all onditions required. He seeks only the deferred compensation of his employment contract; not a windfall, his just due.

Because the radical and innovative concepts of the Court of Appeal have been published, the entire field of retirement benefits may be destablilized. The Opinion also relies upon outdated and irrelevant authority, and fails to consider, or erroneously considers, the leading cases on the subject of earned pension rights of public employees, both of the United States and California Supreme Courts in States where pension rights are

deemed vested contractual rights not mere gratuities. It should not be permitted to stand and cloud this complex area of law, jeopardizing employees' contract rights generally and making a mockery of the purpose for which retirement systems are established, namely, to encourage able men and women to serve the public, and once in office, to continue to serve. After service has been rendered and the contract fully earned by the employee, this decision would allow the State, or any public employer, to destroy him economically by substantially reducing earned and vested pension rights in abrogation of the provisions of the contract of employment during the employee's rendition of service without any offsetting comparable, commensurate advantages. All public retirement systems may be placed in jeopardy if a governmental entity wishes to reduce promised benefits to retirees for any reason. In order that public employees and retirees may continue to anticipate and enjoy the retirement benefits which they have been specifically promised, the writ should be granted.

The Court of Appeal's decision failed to apply the Law of Contracts or honor reasonable expectations. The first rule of Contract Law is that the reasonable expectations of the parties must be preserved. The first rule of Constitutional adjudication is judicial restraint. The Court of Appeal managed to break both these rules at once. Having held that earned pension benefits are not contractual rights, the court failed to apply ordinary rules of contract law, under which it is clear that the repeal of §§ 9359.01 and 9359.04 abrogating in total specific pension benefits was an impairment under the Contract Clause. As a result the Court of Appeal was plunged into a speculation without any basis of fact in the record

before them and ended by striking down seventy-five years of precedent setting cases by the California Supreme Court, e. g., *Betts v. Board of Administration* (1978) 21 Cal.3d 859.

If the Contract Clause is to retain any meaning, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships. The existence and nature of those limits in a series of Supreme Court cases was discussed in *Allied Structural Steel Co. v. Spannaus* (1977) 438 U.S. 234, 242-244.

Despite the customary deference courts give to state laws directed to social and economic problems, "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. The impairments of a State's own contracts face more stringent examination under the Contract Clause than laws regulating contractual relationships between private parties." (*United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23.)

The Court in *Allied* said:

> "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> "The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on

> the protection of private contracts. **Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."** (Emphasis added.)

Here, the petitioner's contract of employment with the State of California included as an additional form of compensation, a defined benefit pension plan, deferred compensation. While serving his State at very modest compensation compared to private industry, he relied heavily, and reasonably, on his legitimate contractual expectations to a reapportionment retirement allowance when he chose not to seek reelection.

The facts are as discussed in *Allied Structural Steel, supra,* at p. 234, "[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure,' *United States Trust Co.* U.S. at 23, simply cannot stand in this case."

AB-7 can hardly be characterized like the law at issue in the *Home Building & Loan Association v. Blaisdell,* 200 U.S. at 439 case, as one enacted to protect a broad societal interest rather than a narrow class. Further, this legislation imposed sudden, totally unanticipated, and substantial reductions in the vested contractual rights of this public officer.

A. A LEGISLATIVE ENACTMENT SUCH AS THE LRL CONTAINS PROVISIONS WHICH, WHEN ACCEPTED BY INDIVIDUALS, BECOME CONTRACTS BETWEEN THEM AND THE STATE WITHIN THE PROTECTION OF THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION

The Court of Appeal erred in relying on the cases of *Dodge v. Board of Education* (1937) 302 U.S. 74 and *Phelps v. Board of Education*, 300 U.S. 319 (precedent rejected by the California Supreme Court in *Legislature v. Eu* 54 Cal.3d 492, 532-534). A similar case which is a precedent here is *Indiana Ex Rel. Anderson v. Brand, Trustee* (1937) 303 U.S. 95. The Indiana Supreme Court had held that the repeal of the Teachers' Tenure Law did not deprive the petitioner of a vested property right and did not impair her contract within the meaning of the Constitution. The Supreme Court granted certiorari. The question was whether there was a vested right in a permanent teacher's contract; whether, under the tenure law, there is a grant which cannot lawfully be impaired by a repeal of the statute.

Just as in this matter, the constitutional validity of the repealing act was drawn in question, and the lower court sustained the statute, so the writ was issued.

The court held the repealing act was an abridgment of contractual rights. After according respectful consideration and great weight to the views of the State's highest court, in order that the constitutional mandate may not become a dead letter, the Supreme Court decided for itself whether a contract was made, what were its terms and conditions, and whether the State had, by later legislation, impaired its obligation. The contracts designed to be protected by the Federal Constitution are contracts by

which perfect rights, certain definite, fixed private rights of property, are vested. . . .

The petitioner had perfect rights, certain and definite under the LRL. The petitioner voluntarily accepted the provisions of the LRL and they became a part of his employment contract with vested contractual rights between the State and him.

B. THE CALIFORNIA SUPREME COURT HAS HELD FOR OVER SEVENTY-FIVE YEARS THAT PENSION RIGHTS ARE CONTRACTUALLY "VESTED"; PROTECTED BY THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION

California had an employment contract with its public officials that gave them vested rights in the Legislators' Retirement System.

It is beyond doubt that the LRL constituted a contractual promise to legislative officers and was part of the consideration for which they worked. A pension is part of a public employee's compensation. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) "Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. [Citation.]" (*Olson v. Cory* (1980) 27 Cal.3d 532, 538.)

II. A STATUTE MAY NOT BE REPEALED WHEN VESTED RIGHTS WOULD BE IMPAIRED WITHOUT VIOLATING THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AS WELL AS THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

It is obvious from the foregoing discussion of the Lower Court's decision herein, that some of the petitioner's retirement benefits were not only impaired, they

were eliminated. Each of his retirement benefits might have been capped in some manner pursuant to Article IV, § 4, but not destroyed.

A Legislator's Retirement rights are vested in accordance with the California Supreme Court decisions; and, therefore, the repeal of statutes 9359.01 and 9359.04 by AB-7 cannot be applied to petitioner. Furthermore, their repeal does not implement a retirement systems' beneficent policy.

Rights to pension benefits are valuable property rights which cannot be taken away by strained construction.

> Sec. 9606. Repeal of statutes. Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal. (Statutes 1943.)

The case of *Pacific Mail S. S. Co. v. Joliffe* 69 U.S. 450, 17 L.Ed. 805 (1864) held that where a right had arisen on a contract or transaction in the nature of a contract authorized by statute and had been so far perfected that nothing remained to be done by the party asserting it, the repeal of the statute did not affect the right, or action for its enforcement. Recently the Court of Appeal rendering the opinion herein held: "[A] statute may not be repealed when vested rights would be impaired." (*Valdes v. Cory* (1983) 139 Cal.App.3d 783, 792, *citing* Government Code § 9606.)

III. ARTICLE IV, § 4 RESERVED THE POWER TO CAP A BENEFIT, BUT THERE WAS NO RESERVATION OF THE RIGHT TO IMPAIR BY TOTAL ABROGATION PETITIONER'S VESTED RIGHT TO STATUTORY BENEFITS OF HIS EMPLOYMENT CONTRACT

A number of sections regarding the Legislature were added by Chapter 1, Stats.1966, 1st Ex. Session, subject to ratification by the people of Assembly Constitutional Amendment No. 13, 1966, and was passed by the people at the general election held Nov. 8, 1966. The Constitutional Amendment was broad and sweeping, and included Article IV, § 4. The Court of Appeals' discussion of Art. IV, § 4 was largely confined to one sentence: "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." It is important to examine the entire Article (and the statutes enacted by the Legislature prior to its passage) entitled, "§ 4. Compensation of members; retirement benefits and allowances."

Prior to submitting this Article to the people, the legislature had adopted §§ 8901, 8902 and 8903 regarding compensation of the legislators, living expense and reimbursement for travel. In regards to retirement benefits and allowances, they had adopted §§ 9359.11, 9359.12 and 9360.10. All of these statutes were to become operative only in the event that Constitutional Amendment No. 13 passed.

Sec. 9359.11 enacted the provisions of the first sentence of paragraph 2 of Art. IV, § 4 regarding the salary for application of the retirement formula for service ending prior to a term commencing in 1967. The provisions of paragraph 3 of the Article are covered by § 9359.12 on the

retirement allowance for service during or after the term commencing in 1967 and § 9360.10 on the cost of living adjustments.

The only subject of the article not covered by statutes which became operative when the Constitutional Amendment No. 13 passed was the one sentence with which we are concerned. There is no provision in the Legislators' Retirement Law (contained in Title 2, Div. 2, Chapter 3.5 entitled RETIREMENT OF LEGISLATORS) which provides that the Legislature may limit retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967. It is not a part of said law, and it was not an element of Senator Walsh's employment contract with the state.

This is in accordance with PERS' interpretation of the law over the years. The purported right to limit benefits under Article IV, § 4 was never set forth in PERS' Annual Reports to the members, the summary, nor the complete recitation of the LRL. It is completely understandable that a layman such as petitioner was unaware of this sentence, and its potential ramifications.

Just as the provisions of the LRS give rise to contractual obligations and are not governed by the provisions of the California Constitution, the provisions of a public employee pension system give rise to contractual obligations and are not governed by the ordinary contract provisions of a city charter. (*Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 709); petition for hearing by Supreme Court denied January 19, 1984. The court said:

> "Fn. 9. ' . . . The provisions of a public employee pension system give rise to contractual obligations and are not governed by the ordinary contract provisions of the charter.' "

The employment contract of the legislators was set forth in the Government Code statutes, not the California Constitution. Art. IV, § 4 had never been made a part of their contract because it had never been enacted in the LRL.

A. "LIMIT" AS USED IN ARTICLE IV, § 4 DOES NOT MEAN "ELIMINATE", "REPEAL" OR "ABROGATE" AS CONSTRUED BY THE LOWER COURT

A statute must be enforced according to its terms. *See United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 241 (1989). *Morrison-Knudsen Const. Co. v. Director, OWCP,* 461 U.S. 624, 633 (1983) recognized the principle "that a word is presumed to have the same meaning in all subsections of the same statute."

I agree with Justice Scalia concurring opinion in *Patterson v. Shumate* decided June 15, 1992, ___ U.S. ___ slip op., No. 91-913, 60 LW 4550 at p. 4553 referring to interpretation of text:

> When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of a "government of laws, not of men."

The Court of Appeal has made this a government of men, not laws. It viewed retirement benefits as one right, a "basic retirement allowance". That is fallacious reasoning. A member of a defined benefit plan has a bundle of rights based upon the specific statutory benefits in effect during his rendition of service. Perhaps when the Legislature added, "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967", they thought they were placing in the Constitution the "Allen" criteria for modification of retirement benefits. That is one of the theories advanced. However, they did not use the word "limit" as eliminate, repeal, or abrogate. They used it in the ordinary meaning to restrict, cap, set a ceiling, or cut back.

Under the position taken by the appellate court, a disability retirement allowance could be eliminated so long as some other benefit would still be available at some time; a judge or legislator could be deprived of his right to retire after 20 years of service without regard to age; or a lesser number of years with a specified reduction in this retirement allowance.

The members of the LRS may have each of their retirement benefits cut back, or capped under certain circumstances, but this one sentence in the Constitution, which was never incorporated in the LRL in the Government Code, does not mean that a retirement benefit can be eliminated. The Lower Court and PERS (in this case contrary to its position in *Legislature v. Eu, supra*) by grouping appellant's bundle of retirement rights have said his benefits have merely been limited. The court concocted a theory whereby a member is only eligible for a "basic retirement allowance" regardless of the other

statutory benefits that were an essential part of his employment contract. Petitioner has four separate retirement rights which are being abrogated in total, DESTROYED, not limited: (1) His right to immediate early retirement was eliminated; (2) His right to the additional benefits of § 9359.18 was eliminated; (3) His right to the annual COLA from the date of his retirement from the Legislature in December, 1974, to September 8, 1986 was eliminated; (4) When he was deemed not eligible to retire, he was unable to continue his enrollment in the group medical plan, so his statutory right to medical and health care after eight years of service was eliminated. This could not be reinstated when he reached age 60.

B. THE LOWER COURT'S CONCLUSION THAT PETITIONER'S RETIREMENT BENEFITS WERE NOT VESTED BASED ON ARTICLE IV, § 4 IS CONTRARY TO THE CALIFORNIA SUPREME COURT'S DECISION IN THE RECENT CASE OF *LEGISLATURE V. EU* 54 CAL.3D 492 (1991)

The California Supreme Court has just reviewed the rights of members of the LRS in which a Constitutional Amendment, Proposition 140, sought to eliminate their right to continue to accrue the various retirement benefits under the LRL for service after its passage. The discussion of retirement benefits is found at 54 Cal.3d 492 at 527-34. These pages are quoted in their entirety in Appendix J (App. 129) because of their importance to this case. Briefly the California Supreme Court held article IV, § 4, did not preclude incumbent legislators from acquiring pension rights protected by the State or Federal Contract Clauses. They concluded that "it would be anomalous to

hold that a legislator's supposedly 'vested' right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive actual benefits has accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto."

The last paragraph correctly depicts the petitioner herein. On the eve of his retirement, his vested pension right to early retirement, cost of living from that date, a special catch up provision, and his medical and health care were terminated.

C. THE DECISION MISCONSTRUES § 9359.04, 9360.7, AND 9359.11 BY NOT CAREFULLY READING THE HISTORY OF SAID SECTIONS NOR INTERPRETING THEIR LANGUAGE ACCORDING TO THE PLAIN MEANING OF THE WORDS

The Lower Court discussed §§ 9359.04, 9360.7 and 9359.11, but it is obvious only a cursury examination was made of AB-7 and its various amendments as discussed in petitioner's Briefs. A close study should show petitioner's arguments are not bizarre, but correct if the statutes are interpreted in accordance with your Court's holdings. As you said in *Webster v. Reproductive Health Serv.* (1989) 492 U.S. 490, at 515; 106 L.Ed.2d 410, at 434:

> "('The basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to **avoid unjust, absurd, unreasonable or confiscatory results, or oppression'**) [Citation]." (Emphasis added.)

IV. PETITIONER HAS BEEN WRONGFULLY DEPRIVED OF RETIREMENT BENEFITS BECAUSE OF A FAILURE OF RESPONDENT TO DEAL FAIRLY AND IN GOOD FAITH

The California Supreme Court in *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d. 374 (hereafter *Hittle*) spelled out the fiduciary duty of an administrator of a pension fund such as PERS to an employee. Pertinent parts of the case are quoted at length in Appendix K (App. 141). Briefly, an employee was injured. A chiropractor authorized him to return to work several months later, but other medical personnel determined he was totally disabled. He did not report to work nor respond to a notice that his absence after the chiropractor's authorization was grounds for termination. Two form letters notified the employee that his contributions would revert to the retirement system if he failed to provide for their disposition with the form for his use. The second letter included a handwritten notation briefly mentioning the possibility of filing for disability retirement, " . . . if you have filed or intend to file for disability retirement you should not withdraw the above contribution . . . ". No form for this option was included. Thereafter, he requested a refund of this retirement contribution on the form letter provided. Several years later, the employee learned that he may have been eligible for retirement disability at the time he withdrew his contribution. The association refused reinstatement of his right to request disability retirement.

The court's inquiry was whether Hittle had a full understanding of his right to apply for disability retirement at the time he withdrew his contributions. In his

declaration submitted to the trial court, Hittle stated that "[a]t the time I withdrew the contributions, I had absolutely no knowledge of the fact that I might qualify for a service-connected disability retirement . . . His declaration was not only well supported by the record, but provides the only rational explanation for his decision to seek reimbursement of his contributions. (*Id.*, at pp. 390-391.)

The Supreme Court remanded the cause with directions to issue a writ of mandate commanding the association to reinstate the employee's membership upon remittance of his retirement contributions plus process his application for disability retirement. The court held that the trial court erred in finding the employee knowingly waived his right to apply for disability retirement. There was no substantial evidence to support the trial court's findings that the association adequately informed the employee of the existence of his right to apply for disability retirement and that the employee was apprised of this right when he withdrew his retirement contributions. The handwritten notation did not explain that disability retirement was distinct from deferred retirement and that the employee could be eligible for disability retirement with fewer than five years of service. Finally, the court held the handwritten notation was inherently ambiguous and uninformative, and could not be said to have satisfied the association's fiduciary obligation to adequately inform the employee of his membership options upon termination of his employment.

In this case, respondent is guilty of bad faith on many counts. Assuming that article IV, § 4 is part of the LRL although never enacted by the Legislature, it was never included in PERS' annual report to the members of

the LRS. A layman such as petitioner was not advised of that one sentence.

When petitioner filed his application to retire on September 30, 1974, he was not given any advice that his retirement benefits might be in jeopardy. There was ample time for PERS to advise petitioner to resign his office and retire under § 9359.04 prior to its repeal. He received no communication of any kind from PERS between the time of his application and the effective date of AB-7. In the December 23, 1986 Memorandum of PERS' attorney, APP. 116, she states that it might have been an error on PERS' part not to have advised petitioner of his option to retire under § 9359.04.

No one advised petitioner he could have sought relief when the retirement benefits were first denied him. He was given the impression that he had to wait until he reached age 60.

The aforementioned Memorandum (App. 96) is attached in its entirety because it is an erudite opinion discussing the facts and law prior to adversary proceedings. The positions advocated in the Memorandum are contrary to those taken to deny the petitioner his rightful retirement benefits. The contents of this Memorandum were withheld from petitioner until it was produced as an exhibit at the Board hearing.

PERS had failed to have any legal interpretation of § 9359.04 from 1971 when it was enacted until the Board hearing in this matter in December, 1988. A non lawyer had determined that the provision did not provide for retirement during a term even though that was the express language of § 9359.04 and the legislative counsel's interpretation when the section was adopted.

Bad faith was illustrated throughout the course of petitioner's efforts to gain his rightful retirement benefits. An attorney general opinion was requested regarding 9359.01, but he was told by PERS not to consider 9359.04 nor 9359.11, even when he suggested it.

One of the most startling aspects of PERS' actions as a trustee is the diametrically opposed positions they have taken in this case and *Legislature v. Eu, supra* (hereafter *Legislature*). Here they advocate that Walsh did not have a vested right to his retirement benefits as discussed by the Lower Court at App. 21. In *Legislature* they advocate incumbent legislators' vested rights similar to the discussion in the Hoehn Memorandum. To illustrate this breach of their affirmative duty to deal in good faith and fairly with Walsh, Appendix L (App. 147) is attached with quotations from PERS' brief in *Legislature*.

The above are just a few examples of PERS' bad faith and over reaching to deprive petitioner of his rightful benefits. Clearly, their actions are contrary to the standards laid down by the California Supreme Court in *Hittle*.

V. THIS CASE INVOLVES AN IMPORTANT ISSUE OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. Pension benefits and their protection are issues of great public importance. They affect not only the petitioner in this case but potentially the pension benefits of all state and local government employees. This decision of the Court of Appeal has been published with its radical concepts to defeat retirement benefits. ERISA was enacted to

promote the interests of private employees and their beneficiaries in employee benefit plans (*Shaw v. Delta Airlines, Inc.* (1983) 463 U.S. 85, 90), and to protect contractually defined benefits. (*Massachusetts Mutual Life Insurance Co. et al v. Russell* (1985) 473 U.S. at 148.) Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.

Public officers and employees deserve the same protection that this Court can give them by granting this petition.

CONCLUSION

Review by this Court is necessary to resolve the above-noted conflicts created by this decision. Review is also necessary so that this Court can resolve the important question of Contract law and the trustee's fiduciary responsibility to protect public employees' retirement benefits. Petitioner respectfully urges this Court to grant

this petition for writ of certiorari and reverse the judgment of the lower court.

DATED: October 7, 1992.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

LAWRENCE E. WALSH, Plaintiff and Appellant, v. BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Defendant and Respondent.	C008704 (Super.Ct.No. 361434)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, Judge. Affirmed.

Barbara Lang Betts for Plaintiff and Appellant.

Richard H. Koppes and Margaret J. Hoehn for Defendant and Respondent.

Once again we consider claims that changes in the Legislator's Retirement Law were improper and impaired the vested rights of a former legislator. Lawrence E. Walsh, a former member of the California State Legislature, appeals from a judgment of the Superior Court of Sacramento County denying his petition for a writ of

mandate. By his petition Walsh sought to compel the defendant Board of Administration of the Public Employees' Retirement System (PERS Board) to award him retirement benefits from the time he left legislative service in 1974 to the time he began drawing retirement benefits at age 60 in 1986, and to recalculate his current allowance based upon the cost of living increases that would have accrued during those years. Walsh's contentions are presented in a somewhat disjointed fashion. Nevertheless, we have carefully considered each of the arguments which we perceive him to be asserting in support of his claim and find none of them persuasive. Accordingly, we shall affirm the judgment of the trial court.

BACKGROUND

The decade colloquially known as the 60's was an extremely significant, and turbulent, period for our state Legislature. In order to address the issues presented in this appeal and to gain perspective we must first briefly relate the historical background in which this dispute arose. From our point of view, the relevant historical perspective includes three subjects: (1) legislative reapportionment; (2) the change from a part-time to a full-time Legislature with compensatory adjustments; and (3) legislative retirement. We consider these in that order.

1. *Reapportionment.* We may begin our discussion of legislative reapportionment with the 1926 initiative amendment of article IV, section 6, of the state Constitution (further references to articles are to the articles of the California Constitution). At that time our Constitution

provided that the state should be divided into 40 Senate districts and 80 Assembly districts. The Senate was to be apportioned on a geographical basis and the Assembly on a modified population basis. The Constitution provided that Assembly districts should be "as nearly equal in population as may be" but also contained geographical limitations upon apportionment of such districts. With respect to Senate districts, the Constitution contained only geographical limitations.

In the 1926 measure it was provided that the Legislature should reapportion the state Senate and Assembly districts in its first regular session following each decennial federal census. In the event the Legislature failed to act a Reapportionment Commission, consisting of the Lieutenant Governor, Attorney General, State Controller, Secretary of State, and State Superintendent of Public Instruction, was charged with the duty to make a reapportionment, subject to the right of referendum. (Former art. IV, § 6.)

The reapportionment scheme created by the 1926 measure was followed in 1928 and thence after each decennial federal census through 1961. (See Yorty v. Anderson (1963) 60 Cal.2d 312, 314.) The geographical basis for Senate apportionment and, to a lesser but nonetheless significant extent, the modified population basis for Assembly apportionment, gave rise to large discrepancies in the population bases for the various legislative districts in the state. (See Silver v. Brown (1965) 63 Cal.2d 270, 275-276.) For example, after the 1961 reapportionment the population bases of Assembly districts ranged from 72,105 to 306,191, and the population discrepancies in Senate districts were even more disparate. (*Ibid.*)

Before 1962 this was not regarded as an impermissible result. In that year, however, the United States Supreme Court rendered its decision in Baker v. Carr (1962) 369 U.S. 186 [7 L.Ed.2d 663]. For our purposes it is sufficient to note that in the decision in *Baker* the Supreme Court held that the apportionment of a state legislature was subject to judicial challenge on equal protection grounds.

The decision in *Baker* generated several challenges to our reapportionment scheme. In Yorty v. Anderson, *supra*, 60 Cal.2d 312, the petitioners sought a writ of mandate to compel the Reapportionment Commission to reapportion state Senate districts upon the ground that the 1961 reapportionment by the Legislature was unconstitutional. The Supreme Court denied extraordinary relief, holding that since the Legislature had not failed to act with respect to the decennial reapportionment required in article IV, section 6, of the Constitution, the jurisdiction of the Reapportionment Commission did not arise. (*Id.* at p. 315.) The court noted that the reapportionment enacted by the Legislature was subject to judicial attack and that in fact a federal action was then pending for that purpose. (*Id.* at p. 318.)

The federal action referred to in *Yorty* resulted in a determination that the 1961 Senate reapportionment was unconstitutional. (Silver v. Jordan (1965) 241 F.Supp. 576.) The United States District Court deferred further action until after July 1, 1965, so that our Legislature would have an opportunity to reapportion the Senate consistent with equal protection principles. (*Ibid.*) The decision of the district court was affirmed by the United States Supreme Court. (Jordan v. Silver (1965) 381 U.S. 415 [14 L.Ed.2d 689].)

In 1965 the state Legislature failed to enact a reapportionment of the Senate within the deadline set by the federal district court. Since the United States Supreme Court had indicated a preference that appropriate state agencies, including state courts, be given an opportunity to adopt valid reapportionment plans before intervention by federal courts, the California Supreme Court took jurisdiction over the matter in Silver v. Brown, *supra*, 63 Cal.2d 270 (see page 275). The court held that the 1961 reapportionment of both the Senate and the Assembly failed to meet constitutional requirements. (*Id.* at pp. 276-277.) The court presented a contingent reapportionment plan to be used in the 1966 legislative elections in the event the Legislature failed to act. (*Id.* at p. 281.) However, the court noted that there was time for the Governor to call the Legislature into special session to enact a reapportionment plan for the 1966 elections, and the court held that in the event a valid plan was adopted by the Legislature then that plan would prevail. (*Id.* at pp. 277-278, 281.)

In response to the decision in Silver v. Brown, *supra*, 63 Cal.2d at p. 270 the Governor called the Legislature into extraordinary session and the Legislature enacted a reapportionment plan. While the Legislature was still in session certain technical errors were discovered and the Legislature passed a corrective bill. However, in the corrective bill the Legislature attempted to provide additional pension benefits to legislators affected by reapportionment. In view of the pension provisions, the Governor refused to sign the corrective bill and it did not take effect. In Silver v. Brown, *supra*, 63 Cal.2d 841, the

Supreme Court corrected the technical errors and ambiguities in the reapportionment plan as a matter of construction, and as corrected upheld the plan. (*Id.* at p. 846.)

As can be seen from this history, the 1966 legislative elections represented a major change in the way in which the members of our Legislature were chosen. For the first time the members of our Legislature were elected from districts which were approximately equal in population size. As reflected in the first Silver v. Brown decision, 63 Cal.2d at page 276, with respect to at least some members of the Legislature this had the effect of drastically altering the districts from which they had previously been elected.

2. *The Change to A Full-Time Legislature.* Prior to 1966 our Constitution provided for what has been called a part-time or citizen Legislature. Former article IV, section 2, subdivision (a), provided for annual legislative sessions. Sessions in odd-numbered years were considered general sessions and were not permitted to exceed 120 days in duration. Sessions in even-numbered years were considered budget sessions and during such sessions the Legislature was permitted to consider only the Budget Bill, revenue acts necessary therefor, the approval or rejection of charters and charter amendments of local governments, and acts necessary to provide for the expenses of the session. Under subdivision (c), budget sessions were not permitted to exceed 30 days in duration, although during that time the Legislature was permitted to recess for 30 days to permit committee consideration of the Budget Bill. Subdivision (b) provided for legislative salaries of $500 per month during the term for which the member was elected.

In 1966, a constitutional revision was submitted to the voters for the purpose of converting the Legislature into what may be termed a full-time body. The ultimate proposal was the result of lengthy consideration by the Constitutional Revision Commission and the Legislature. The goal of this process was the conversion of the Legislature to a full-time body by means of a constitutional revision which would be palatable to the electorate. The measure which was ultimately proposed provided for the Legislature to meet annually in regular sessions without limitation either as to duration or to the matters which could be considered. (Art. IV, § 3, subd. (a).) The measure ratified a previously enacted statute raising legislative salaries from $6,000 to $16,000 per year. (Art. IV, § 4; art. XXII, § 6; Gov. Code, § 8901, Stats. 1966, First Ex. Sess., ch. 163, § 2, p. 721; see Lyon v. Flournoy (1969) 271 Cal.App.2d 774, 778.) Thereafter the Legislature was permitted to increase salaries by statute, provided that such adjustments could not exceed five percent for each calendar year following the operative date of the last adjustment. (Art. IV, § 4.) This measure was adopted by the voters at the November 1966 election which, coincidentally, was the first legislative election held under the reapportionment made necessary by equal protection principles.

3. *Legislative Retirement.* The Legislators' Retirement Law (hereafter the LRL), was enacted in 1947, to be administered by the PERS Board. (Gov. Code, § 9350, et seq., Stats. 1947, ch. 879, § 1, pp. 2058-2065.) When enacted there was some question as to the validity of the LRL, since the Constitution provided that legislators "shall receive no compensation for their services other

than that fixed by the Constitution. . . . " (Former Cal. Const., art. IV, §§ 23, 23b.) Based upon an opinion of the Attorney General, the PERS Board refused to permit legislators to file elections to participate in the LRL. (See Stats. 1948, ch. 10, § 2, p. 13.) In Knight v. Bd. etc. Employees' Retirement (1948) 32 Cal.2d 400, at pages 402-403, the Supreme Court upheld the LRL. The court reasoned that former article IV, section 22a, of the Constitution, which permitted the Legislature to provide for retirement for employees of the state, was sufficiently broad to include legislators and was an implied modification of sections 23 and 23b of article IV. (*Ibid.*)

During the years the LRL was amended numerous times, generally to provide greater levels and/or different types of benefits for members. (See, e.g., Stats. 1949, ch. 1570, § 6, p. 2809; Stats. 1961, ch. 1897, §§ 1, 3, pp. 4005-4007 [adjustment of age and service requirements for retirement]; Stats. 1953, ch. 17, § 1, pp. 623-624; Stats. 1957, ch. 1871, § 1, pp. 3275-3276; Stats. 1959, ch. 2133, § 1, p. 5047; Stats. 1963, ch. 1597, § 1, p. 3175 [providing for and increasing death benefits]; Stats. 1957, ch. 1212, § 1, pp. 2496-2497; Stats. 1959, ch. 766, § 1, pp. 2752-2753 [increasing pension benefits]; Stats. 1957, ch. 1871, § 3, pp. 3276-3277 [providing for spousal and dependent benefits]; Stats. 1961, ch. 2123, § 1, pp. 4381-4382 [providing for disability benefits]; Stats. 1966 First Ex. Sess., ch. 152, § 1, p. 693 [providing for health and life insurance benefits].) During the first half of the 1960's the Legislature's frustrated desire for a salary increase and the turbulence occasioned by the judicially compelled reapportionment of legislative districts resulted in the enactment of two significant amendments of the LRL.

Prior to 1963, the basic means for adjusting legislative pensions to reflect changes in the cost of living consisted of tying such pensions to the salary of incumbent members of the Legislature. (See Lyon v. Flournoy, *supra*, 271 Cal.App.2d at p. 777.) At that time the last salary increase for incumbents had been approved in 1953, to commence in 1954, when salaries were increased to $500 per month. By 1963 the voters had rejected four measures to increase legislative salaries. (*Id.* at pp. 784-785.) In 1963, in frustration over the voters' refusal to liberalize legislative salaries, the Legislature enacted a measure to provide for the adjustment of all legislative pensions to reflect increases in the federal cost-of-living indices since 1954, and thereafter to require annual adjustment. (Gov. Code, § 9360.9, Stats. 1963, ch. 2174, § 2, p. 4563.)

In 1965, confronted with judicially compelled reapportionment, the Legislature added section 9359.01 to the Government Code to provide: "A Member of the Senate or Assembly who is not returned to office, or who chooses not to run, when the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired, upon his written application to the board, at the conclusion of his current term provided the member is credited with a minimum of four years service." (Stats. 1965, ch. 688, § 1, pp. 2063-2064.) This provision was amended in 1969 to read: "A Member of the Senate or Assembly who is not returned to office, or who chooses not to run, when the boundaries of the Senate or Assembly district, respectively, in which he was

resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, or who resigns his office upon election or appointment to another public office during the term in which the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired, upon his written application to the board, at the conclusion of his current term provided the member is credited with a minimum of four years service. [¶] A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement as of the day following the expiration of term of office of the member. [¶] This section shall not apply to persons first elected to the Senate or Assembly after December 31, 1969." (Stats. 1969, ch. 1582, § 1, pp. 3215-3216.)

The question of legislative retirement benefits was a major concern in seeking voter approval of the 1966 constitutional revision. In preparation for the constitutional revision the Legislature adopted Government Code section 9359.11, which would preclude any legislator whose service ended prior to the term which would begin in 1967 from receiving retirement benefits based upon a salary level in excess of $500 per month. The constitutional revision included a provision which stated: "The Legislature may not provide retirement benefits based on any portion of a monthly salary in excess of 500 dollars

paid to any member of the Legislature unless the member receives the greater amount while serving as a member in the Legislature." (Art. IV, § 4.)[1] For those persons who would serve in the Legislature after the one-person-one-vote reapportionment and the conversion to a full-time Legislature, the constitutional revision provided: "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." (Former art. IV, § 4.)[2]

In the November 1966 legislative elections plaintiff Walsh was elected to the state Senate. He took office in January 1967. He was reelected in 1970. In 1974 Walsh chose not to run for reelection. His second term of office

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[1] This restriction upon legislative pension levels has been upheld against constitutional attack. (Lyons v. Flournoy, *supra*, 217 Cal.App.2d at pp. 786-787; see also Allen v. Board of Administration (1983) 34 Cal.3d 114, 125.)

[2] Under Government Code section 9360.9, retired members of the LRL received pension adjustments based upon the increase of the cost-of-living indices since 1954 regardless when the member retired. Thus, a member who retired in 1965 would receive a pension allowance based upon 1965 salary levels adjusted for the cost-of-living increase since 1954. (Stats. 1963, ch. 2174, § 2, p. 4563.) The 1966 constitutional revision provided that for members who served during the term which began in 1967 or thereafter, cost-of-living adjustments would be based upon the time of retirement, except that legislators could retain increases based upon the salary of $500 per month which had accrued before the 1967 term. (Former art. IV, § 4, as amended in 1966.)

expired on December 2, 1974, and he received full salary as a senator until January 5, 1975.[3]

Pursuant to our Constitution, 1971 was a decennial reapportionment year. In that year the Legislature enacted Government Code section 9359.04 to provide: "In lieu of retirement pursuant to Section 9359.01, a Member of the Senate or Assembly who is not returned to office, or who chooses not to run, or who resigns his office upon election or appointment to another public office during, or at any time after, the term in which the boundaries of the Senate or Assembly district which he represents, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired upon his written application to the board, provided the member is credited with a minimum of four years service and was first elected to the Senate or Assembly prior to December 31, 1969. [¶] If a member does not retire at the conclusion of the term of office during which the boundaries of his district were altered pursuant to a reapportionment of legislative districts he shall notify the board in writing within 30 days after the conclusion of that term of his intention to retire pursuant to the provisions of this section at some unspecified future date. [¶] Service after the

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[3] Before 1972 members of the Legislature commenced their terms in January of the year next following their election. In 1972 article IV, section 2, subdivision (a), was amended to provide that legislators begin their terms on the first Monday in December following their election. Article XX, section 6, provides that any legislator whose term is reduced by the 1972 amendment to article IV, section 2, shall be entitled to retirement benefits and compensation as though the term had not been reduced.

term in which a member's district was altered pursuant to a reapportionment of legislative districts shall be disregarded for purposes of computing any retirement allowance received as a result of qualifying for retirement pursuant to this section. However, such service shall be credited for purposes of computing the member's retirement allowance received after qualifying for retirement pursuant to provisions other than this section. [¶] A member who notifies the board of his intention to retire pursuant to the provisions of this section shall pay his contribution rate of 8 percent of gross salary to the Legislators' Retirement System during service after the term in which the boundaries of his district were altered pursuant to a reapportionment of legislative districts." (Stats. 1971, ch. 1820, § 2, pp. 3946-3947.)

The purpose of the enactment of Government Code section 9359.04 was expressly set forth: "It is the intent of the Legislature in enacting this act to provide for the retention in public service of experienced legislative leadership. [¶] Section 9359.01 of the Government Code was enacted during the 1965 reapportionment term. The Legislature recognizes that this section would be activated by the 1971 reapportionment. Therefore, the state is faced with the possibility of a mass retirement in the Legislature on January 1, 1973, and the consequent state retirement costs and the loss of experienced legislative leadership." (Stats. 1971, ch. 1820, § 3, p. 3947.)

In 1974 the Governor called the Legislature into extraordinary session to consider and act upon legislation relative to the LRL. In response the Legislature enacted urgency legislation to take immediate effect. (Stats. of 1974, 2d Ex. Sess., ch. 1, pp. 3953-3957.) The stated

urgency was so the provisions of the act would be applicable to members who would leave office in 1974. (Stats. 1974, Second Ex. Sess, ch. 1, § 10, p. 3957.) The measure was signed by the Governor and became effective on October 7, 1974. Among other things, the act repealed sections 9359.01 and 9359.04 of the Government Code. (Stats. 1974, Second Ex. Sess., ch. 1, §§ 2, 4, p. 3953.) It was provided that the repeal of section 9359.01 should not be construed to affect the benefits of any member who retired pursuant to that section prior to January 3, 1967. (Stats. 1974, Second Ex. Sess., ch. 1, § 8, p. 3957.)

On September 30, 1974, Walsh wrote to the PERS Board to state: "It is my intention to retire at the close of my elected term of office. I hereby apply for retirement pursuant to the provisions of Government Code section 9359.01. [¶] I chose not to run for office for the term in which the boundaries of my Senate district were reapportioned." On October 15, 1974, the PERS Board replied to Walsh to advise him that section 9359.01 had been repealed effective October 7, 1974, and that he otherwise failed to meet the minimum age and service requirements for immediate retirement. At the end of his second term Walsh was 48 years old and was credited with 8 years of service.

On August 26, 1986, Walsh asked for an administrative appeal of the decision to deny his reapportionment retirement benefits. The PERS Board stipulated that it had permitted him to keep his appeal rights open and thus accepted jurisdiction. After an administrative hearing the PERS Board denied Walsh's claim for additional pension

benefits.[4] Walsh petitioned for a writ of administrative mandate. After a hearing the trial court issued a lengthy decision rejecting each of Walsh's contentions. Walsh appeals from the ensuing judgment which rejected his petition for a writ of mandate.

DISCUSSION

I

Walsh first contends the trial court erred in holding that the application of the repeal of Government Code sections 9359.01 and 9359.04 was authorized by the former version of article IV, section 4 of the state Constitution and did not impair his vested rights to retirement benefits. We begin with the impairment of contract contention.

Article I, section 10, clause 1, of the Constitution of the United States sets forth certain powers that are prohibited to the states. Among other things, that section provides: "No state shall . . . pass any . . . law impairing the obligation of contracts, . . . " Under this clause, a

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[4] Walsh's claim has been considered by the executive and legislative branches of government on several occasions, with consistent results. In 1974, the Legislative Counsel offered opinion No.17955, advising that early reapportionment retirement could be denied to sitting members of the Legislature. In 1985, the Legislative Counsel offered opinion No. 10048, advising that the repeal of Government Code sections 9359.01 and 9359.04 was properly applied to deny early retirement benefits to a person who served during the period of Walsh's service. In 1987, upon a request of the PERS Board, the Attorney General published an opinion concluding that Walsh is not entitled to the benefits he seeks. (70 Ops.Cal.Atty.Gen. 214 (1987).)

"state can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals." (Woodruff v. Trapnall (1850) 51 U.S. (10 How.) 190, 207 [13 L.Ed. 383, 390].)

When a claim is presented under the contract clause three questions may arise. First, it must be determined whether there is a valid contract to be impaired. The contract clause does not protect expectations that are based upon contracts that are invalid, illegal, unenforceable, or which arise without the giving of consideration. (Crane v. Hahlo (1922) 258 U.S. 142, 146 [66 L.Ed. 514, 517]; Ochiltree v. Iowa R. R. Contracting Co. (1875) 88 U.S. (21 Wall.) 249, 252-253 [22 L.Ed. 546, 548].) Nor does the contract clause protect expectations which are based upon legal theories other than contract, such as quasi-contract or estoppel. (Freeland v. Williams (1889) 131 U.S. 405, 414 [33 L.Ed. 193, 197]; Louisiana v. Mayor, etc., New Orleans (1883) 109 U.S. 285, 289-290 [27 L.Ed. 936, 938].) Second, if a contract is found, it must be determined whether a challenged law is consistent with its express or implied terms. Modification of contractual rights through subsequent legislation may be consistent with, rather than an impairment of, the contract of the parties. (City of Torrance v. Workers' Comp. Appeals Bd. (1982) 32 Cal.3d 371, 379.) Finally, if impairment is found, it must be determined whether the impairing law exceeds the bounds of the constitutional limitations. Not every impairment of a contract will violate the contract clause. Thus, "the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen

advantages or burdens on a contracting party constitutional immunity against change.' " (Lyon v. Flournoy, *supra*, 271 Cal.App.2d at p. 782, citation omitted.) And, "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." (Home Building & Loan Asso. v. Blaisdell (1934) 290 U.S. 398, 435 [78 L.Ed. 413, 427].)

Whether a law violates the contract clause of the federal Constitution is a federal question, but determining the existence and meaning of a contract requires reference to state law. (Indiana ex rel. Anderson v. Brand (1938) 303 U.S. 95, 100 [82 L.Ed. 685, 690].) In considering the existence and meaning of a contract the United States Supreme Court will grant deference to the highest state court to consider the matter unless that court's decision is "palpably erroneous" or "manifestly wrong." (Hale v. Iowa State Bd. of Assessment and Review (1937) 302 U.S. 95, 101 [82 L.Ed. 72, 76]; Phelps v. Board of Education (1937) 300 U.S. 319, 322-323 [81 L.Ed. 674, 677].) And where it is asserted that a statutory scheme creates contractual rights which may not be impaired by subsequent legislation, the United States Supreme Court will presume otherwise. "The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." (Indiana ex rel. Anderson v. Brand, *supra*, 303 U.S. at p. 100 [82 L.Ed. at pp. 690-691].) Thus, it is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption. (Dodge v.

Board of Education (1937) 302 U.S. 74, 79 [82 L.Ed. 57, 62].)

There is nothing inherent in government retirement plans which compels the conclusion that they are protected against modification under the federal Constitution. For example, federal laws which create pension plans are considered to be social and economic legislation and the pension plans are not contractual in nature and thus may be modified or even eliminated. (U.S. Railroad Retirement Bd. v. Fritz (1980) 449 U.S. 166, 174 [66 L.Ed.2d 368, 375].) On some occasions the United States Supreme Court has upheld modification of state pension plans under the contract clause. (Dodge v. Board of Education, *supra*, 302 U.S. at pp. 78-81 [82 L.Ed. at pp. 61-63]; Phelps v. Board of Education, *supra*, 300 U.S. at p. 323 [81 L.Ed. at p. 677].) However, under California law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits. (See Allen v. City of Long Beach (1955) 45 Cal.2d 128; Terry v. City of Berkeley (1953) 41 Cal.2d 698; Kern v. City of Long Beach (1947) 29 Cal.2d 848.) Where it is feasible to do so the enactment of a governmental pension plan should be construed as guaranteeing full payment to those entitled to its benefits with the provision of adequate funds for that purpose. (Bellus v. City of Eureka (1968) 69 Cal.2d 336, 351. See also Carman v. Alvord (1982) 31 Cal.3d 318, 332.)

The respondent PERS Board contends that the LRL, which is unique among California governmental pension plans, should not be construed to have granted contractual rights to its members. The LRL does appear unique among California governmental pension plans. In this

state governmental pension plans are typically funded by (1) the creation of an actuarially based retirement fund; (2) a provision for continuous appropriations or continuing obligations of the governmental entity; or (3) some combination of both. (See, e.g., Gov. Code, §§ 20751, 20752 [state employees]; §§ 31963, 31964, 32030-32032 [county employees]; §§ 45342, 45343 [city employees]. See also 49 Cal.Jur.3d (1979) Pensions and Retirement Systems, § 11, pp. 224-225.) In enacting the LRL in 1947, the Legislature did not create an actuarially based fund and did not provide for continuous appropriations for the payment of benefits. Instead, funding for the payment of benefits under the LRL was left to future year-to-year appropriations. (Former Gov. Code, § 9358, Stats. 1947, ch. 879, § 1, p. 2062.) In doing so the Legislature provided: "The provisions of Section 9358 do not constitute an appropriation of money from the State Treasury. The sum required for state contributions shall be appropriated in each State Budget Act, or otherwise." (Former Gov. Code, § 9358.1, Stats. 1947, ch. 879, § 1, p. 2062.)[5]

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[5] In the mid-1970's the Legislature began to reform the LRL into an actuarially sound pension system. The legislative efforts in this regard included reducing benefits under the LRL to those consistent with a sound pension system, the creation of an actuarially based fund for the payment of future benefits, and, in 1977, the enactment of a continuing appropriation to support the payment of state contributions into the fund. (See Gov. Code, § 9354.5, Stats. 1972, ch. 1192, § 1, p. 2313 [requiring the PERS Board to maintain data and conduct an actuarial evaluation of the system]; Gov. Code, § 9359.1, Stats. 1974, Second Ex. Sess., ch. 1, § 5, p. 3953 [restricting the theretofore extraordinary cost-of-living raises granted under the LRL]; Gov. Code, § 9358, Stats. 1977, ch. 937, § 2, p. 2864 [providing a continuing appropriation for state contributions to the fund].) The enactment of

Under our Constitution the state can incur valid contractual obligations in four ways: (1) by legislative authorization where the liability created will not cause aggregate state liabilities to exceed $300,000; (2) by legislative authorization in case of war to repel invasion or suppress insurrection; (3) by compliance with constitutional debt limitation requirements, which include a two-thirds vote of each house of the Legislature and approval by the majority of the voters at a general election or direct primary; or (4) by legislative authorization supported by an appropriation. (Cal. Const., art. XVI, §§ 1, 7.) The LRL was not even arguably enacted in compliance with the first three of these means. Where it is feasible to do so a retirement law will be construed as providing a continuing appropriation for the payment of benefits (Carman v. Alvord, *supra*, 31 Cal.3d at p. 332; Bellus v. City of Eureka, *supra*, 69 Cal.2d at p. 351), but that is not possible with the LRL in view of the Legislature's express declaration that the law was not an appropriation.

Under our Constitution the creation of an enforceable contract with the state requires compliance with the constitutional debt limitation provisions of article XVI, section 1, or a valid appropriation in support of the contract under article XVI, section 7. (Riley v. Johnson (1933) 219 Cal. 513, 520-521; People v. Pacheco (1865) 27 Cal. 175, 210-221.) In this respect our law is consistent with federal

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an appropriation in support of the LRL occurred well after Walsh's service ended and cannot apply to him. (See Longshore v. County of Ventura (1979) 25 Cal.3d 14, 23, 27; Simpson v. Cranston (1961) 56 Cal.2d 63, 69-70; Martin v. Henderson (1953) 40 Cal.2d 583, 591.)

law and the law of nearly every state in the Union. (Humbert v. Dunn (1890) 84 Cal. 57, 59. See Sutton v. United States (1921) 256 U.S. 575, 578-579 [65 L.Ed. 1099, 1101-1102].) Persons who deal with the government are held to have notice of this limitation upon the authority to enter into contracts. (*Ibid.*)

The PERS Board asserts that since the LRL was not supported by a continuing appropriation during the period of Walsh's service, it follows that he could not have acquired a contractual right to the payment of specific benefits. In this assertion the PERS Board relies upon a recent decision of this court in the consolidated cases of Knight v. Board of Administration of the Public Retirement System (Sept. 4, 1990) C005934 and Flournoy v. Board of Administration of the Public Retirement System (Sept. 4, 1990) C005622. In that decision we relied in part on such reasoning in rejecting contract clause attacks upon article III, section 7, of the state Constitution, which was added to the Constitution by Proposition 57 at the November 1986 General Election, and which restricted certain pension benefit increases to former executive officers. The California Supreme Court denied a petition for review, the United States Supreme Court denied a petition for a writ of certiorari, and that decision is now final. However, the California Supreme Court directed that the decision not be published in the official reports and thus it lacks precedential value. (Cal. Rules of Court, Rule 977(a).)

In view of the depublication of our opinion in the *Knight* and *Flournoy* cases, we will consider the PERS Board's assertion to be a request that we consider and reiterate the reasoning we employed there. In this case,

however, it is unnecessary to do so. Throughout the period of Walsh's service our Constitution contained an express reservation of power to the Legislature to limit the retirement benefits of members of the Legislature before their retirement. (Art. IV, § 4, para. 3, as amended Nov. 8, 1966.) The modification of a retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any contract extended by the plan and does not violate the contract clause of the federal Constitution. (International Assn. of Firefighters v. City of San Diego (1983) 34 Cal.3d 292, 300-303; City of Torrance v. Workers' Comp. Appeals Bd., *supra*, 32 Cal.3d at p. 379; Wallace v. City of Fresno (1954) 42 Cal.2d 180, 183.) If the modification of Walsh's retirement benefits was consistent with the reservation of power to the Legislature, then it was valid regardless whether the LRL can be said to have granted contractual rights to members of the Legislature. Accordingly, we turn to that question.[6]

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[6] In Legislature v. Eu (1991) 54 Cal.3d 492, the California Supreme Court considered the constitutional validity of Proposition 140 adopted at the November 6, 1990, General Election, a proposition which has been referred to as the term limitation initiative. Although the court generally upheld the provisions of the measure, it struck down provisions which would have terminated the LRL with respect to incumbent members of the Legislature. (*Id.* at pp. 528-534.) The high court concluded that while the question is not free from doubt, federal decisional authorities would not appear to withhold contract clause protection from incumbent state legislators who have acquired vested pension rights under state law. (*Id.* at p. 533.) As we have previously noted, in 1977 the Legislature enacted a continuing appropriation in support of the LRL. (Gov. Code, § 9358; Stats. 1977, ch. 937, § 2, p. 2864.) We have no doubt that incumbent members of the Legislature at the time of the adoption of Proposition 140 had contractually vested pension rights under the

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Former article IV, section 4, paragraph 3, of the state Constitution, provided in relevant part: "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." Walsh asserts that whatever power this gave the Legislature, it did not permit it to abrogate or eliminate his retirement benefits.

First, we reject the assertion that Walsh's retirement benefits were abrogated or eliminated. Over the years the LRL has been amended many times, usually to increase benefits or to provide new types of benefits. Through the years the *basic* requirements for eligibility to draw benefits have been based upon age and length of service. The LRL now provides that a member may retire at the age of 60 with 4 years of service, after 20 years of service regardless of age, or after 15 years of service regardless of age but with a reduction in benefits equal to 2 percent for every year the member is less than 60 years of age. (Gov. Code, §§ 9359, 9359.16.)[7]

LRL which would be protected under the contract clause. The question whether a former member of the Legislature acquired a contractual right to wholly unmodifiable pension benefits when he served during a time when the LRL was neither actuarially funded nor supported by a continuing appropriation, was not a question which was implicated in the Legislature v. Eu decision.

[7] When it was enacted in 1947 the LRL provided for retirement at age 63 with 1 or more years of service. (Stats. 1947, ch. 879, § 1, p. 2062.) In 1949 it was amended to add a provision to permit a member to retire after 20 years of service regardless of age. (Stats. 1949, ch. 1570, § 6, p. 2809.) In 1951 it was amended

After Walsh's second term in the state Senate, he was credited with eight years of service. His eligibility to retire at age 60 under the basic LRL eligibility provisions was not affected by the 1974 urgency legislation and in fact he did begin to draw LRL benefits at age 60. Under these circumstances Walsh's retirement benefits were not "abrogated" or "eliminated," which would imply a complete denial of benefits. Thus, the question is not whether his benefits were eliminated but is rather whether the denial of early, reapportionment-based retirement was within the power of the Legislature to limit Walsh's retirement benefits.

In interpreting a statute or constitutional provision the first reference must be to the words used in the provision. Such words should be given the meaning they bear in ordinary usage and if the language of the provision is clear and unambiguous then there is no need for judicial construction. (Lungren v. Deukmejian (1988) 45

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to provide that any member serving on the effective date of the amendment could retire at age 63 regardless of the length of service, those later elected could retire at age 63 with 6 years of service, and any member could retire after 20 years of service regardless of age. (Stats. 1951, ch. 1660, § 4, p. 3793.) In 1961 the LRL was amended to provide that members serving upon the effective date of the amendment could retire at age 60 regardless of the length of service, later elected members could retire at age 60 with 4 years of service, and any member could retire after 20 years of service regardless of age. (Stats. 1961, ch. 1897, § 1, pp. 4005-4006.) Also in that year Government Code section 9359.16 was enacted to permit a member to retire before age 60 with a reduced allowance after 15 years of service. (Stats. 1961, ch. 1897, § 3, p. 4007.) These are the basic requirements which obtain now.

Cal.3d 727, 735.) "Limit" generally means "To abridge, confine, restrain, and restrict. To mark out; to define; to fix the extent of. . . . " (Black's Law Dict. (5th ed. 1979) p. 834.) Webster's Third New International Dictionary (1971) at page 1312, provides the following definitions of limit: "to assign to, or within certain limits." "To set bounds or limits to." And, "to curtail or reduce in quantity or extent." Synonyms include restrict, circumscribe and confine. (*Ibid.*) It is said that "LIMIT stresses the fact of the existence of boundaries, . . . " (*Ibid.*) In the 1974 urgency legislation the Legislature did not eliminate Walsh's retirement benefits; rather, it confined his benefits to those consistent with the basic eligibility provisions of the LRL by repealing provisions which would have made him eligible for extraordinary benefits. This action would, on its face, appear to be consistent with the Legislature's reserved power to limit retirement benefits under the LRL.

The LRL, as it was enacted and during the period of Walsh's service, was unique in more ways than one. For one thing, the benefit and eligibility criteria of the LRL were under the direct control of the very persons who expected to receive benefits under it. For another thing, the LRL and its numerous amendments were enacted without any attempt to create an actuarially based fund or to provide continuing appropriations for its benefits, and thus the LRL was not subjected to comprehensive planning with respect to the benefits which would become payable and the source of funds to pay them. As a result the LRL was peculiarly susceptible to the possibility of conferring unwarranted windfall benefits to its members and of creating an unreasonable drain on the

public fisc. (See Lyon v. Flournoy, *supra*, 271 Cal.App.2d at p. 786.)

In its decision in this case the trial court concluded that the reservation of power in the Legislature to limit retirement benefits under the LRL was enacted "not only to prevent a windfall to retired and retiring legislators, but also to provide the Legislature with a general authority to restrict retirement benefits in the future when necessary to control excesses in the system." That this is undoubtedly correct is established by reference to the terms of former article IV, section 4, of the Constitution. It further appears that the early retirement sought by Walsh is precisely the type of excess which the Legislature had the power to correct.

The 1965 provision for early, reapportionment-based retirement was an extraordinary measure enacted in extraordinary circumstances. At the time the Legislature was not only contemplating transformation into a full-time body with significantly increased compensation, it was also facing the first election under court-ordered reapportionment made necessary by equal protection principles. In short, the Legislature was facing the end of one era and the beginning of another. These changes were likely to have a profound effect on at least some of the incumbents. It was under those circumstances that the Legislature determined to permit early reapportionment-based retirement for its members. But whatever the wisdom of such "golden parachute" legislation during the turmoil of the 60's, the measure did not serve, and was contrary to, the purposes of a pu[illegible]lic pension plan in later decennial reapportionment years.

The purpose of a public pension system is to permit employees who become superannuated or otherwise incapacitated to retire without hardship and to be replaced by more capable employees. (See Gov. Code, § 20001; Quintana v. Board of Administration (1976) 54 Cal.App.3d 1018, 1021.) Superannuated, of course, means "incapacitated or disqualified for active duty by advanced age." (Webster's Third New Intern. Dict. (1971) p. 2293.) That this was the purpose of the LRL is beyond dispute. In Knight v. Bd. etc. Employees' Retirement, *supra*, 32 Cal.2d at pages 402 and 403, the Supreme Court held that the Legislature had the power to enact the LRL under former article IV, section 22a of the Constitution, which provided in full: "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law. The Legislature shall have power to fix and from time to time change the requirements and conditions for retirement which shall include a minimum period of service, a minimum attained age and minimum contribution of funds by such employees and such other conditions as the Legislature may prescribe, subject to the power of the Legislature to prescribe lesser requirements for retirement because of disability. [¶] The rates of contribution and the periods and conditions of service and amount of retirement salaries fixed in pursuance of this section shall not be changed except by the vote of two-thirds of the members

elected to each of the two Houses of the Legislature." [8] The reapportionment-based retirement benefits sought by Walsh would have entitled him to immediate retirement with minimal service and without regard to age or disability. Such an extraordinary result is not permitted under other types of public pension plans and is inconsistent with the purpose of a governmental retirement plan.

In addition to providing subsistence for the old-age or disability of individual employees and their dependents, public pension plans serve the public purpose of inducing qualified persons to enter and continue in public service. (Phillipson v. Board of Administration (1970) 3 Cal.3d 32, 49; Quintana v. Board of Administration, *supra*, 54 Cal.App.3d at p. 1021.) Soon after the conversion to a full-time Legislature, the Legislature learned that early reapportionment-based retirement was contrary to this purpose. It specifically so declared in the Statutes of 1971, chapter 1820, section 3, at page 3947. This factor, and the added burden upon the public treasury in paying early retirement benefits, caused the Legislature first to modify, and finally to repeal eligibility for early retirement based upon reapportionment.

Under these circumstances it appears that the windfall benefits granted under former Government Code sections 9359.01 and 9359.04 were precisely the type of excess that the Legislature was given the power to correct

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[8] Since article IV, section 22a, provided the authority to the Legislature to enact the LRL, and since that section required state pension plans to include minimum age requirements except in cases of disability, the reapportionment-based retirement provisions of Government Code section 9359.01, enacted in 1965, were in facial conflict with the Constitution.

in the constitutional revision of 1966. We do not find the repeal of those sections prior to Walsh's retirement to have been beyond the power of the Legislature under former article IV, section 4, of the Constitution.

The recent decision in Legislature v. Eu, *supra*, 54 Cal.3d 492, does not alter this conclusion. There the Supreme Court generally upheld reformation of the Legislature by the initiative process, but struck down provisions which would terminate the LRL with respect to incumbent members of the Legislature. In referring to present article IV, section 4, subdivision (c), the court emphasized that the provision permitted *the Legislature* to limit retirement benefits of its members under the LRL and concluded that "the provision neither states nor implies that these rights are thus deemed inchoate and unprotected from impairment by the initiative process." (*Id.* at p. 529.) The court also noted that Proposition 140 contemplated the complete termination of the LRL rather than the mere modification or adjustment of pension rights of incumbent legislators and then ruled that the measure could not be upheld under the potential but unexercised limitations of article IV, section 4. (*Id.* at p. 530.) Here we are concerned with a legislative limitation upon pension benefits rather than the termination of pension rights by initiative measure and the decision in Legislature v. Eu is consequently inapposite.

III

Walsh contends that even if he could not retire at the end of his term under former Government Code section

9359.01, he was entitled to retire under former Government Code section 9359.04, which was also repealed in 1974, and that the PERS Board should have so advised him. We have set forth the text of Government Code section 9359.04 earlier in this opinion. We agree with the PERS Board and the trial court that Walsh was not entitled to retire under this provision.

Walsh relies upon certain language from section 9359.04. Thus he asserts (with emphasis his) that the section provides: " 'In lieu of retirement pursuant to §9359.01, a member of the Senate . . . who chooses not to run . . . *during* . . . the term in which the boundaries of the Senate or Assembly district which he represents, respectively, are altered pursuant to reapportionment of legislative districts, *may be retired upon his written application to the board*, . . . ' " According to Walsh, the phrase "upon his written application" signifies immediacy and should be construed to mean contemporaneously with his application. Therefore, the argument continues, a member of the Legislature would be entitled to immediate retirement in mid-term simply by submitting an application for retirement to the PERS Board. Since Walsh submitted his application for retirement under Government Code section 9359.01 shortly before, and in anticipation of, the effective date of the repeal of Government Code sections 9359.01 and 9359.04, he asserts that he was entitled to immediate retirement under Government Code section 9359.04 and should have been so advised by the PERS Board.

In a statute which provides for one event "upon" some other contingency, the word "upon" is a word of variable meaning. It may mean "at the time of" or "with little or no interval thereafter." On the other hand, it may

mean "in consequence of" or "on condition of," without implying contemporaneity. (See 70 Ops.Cal.Atty.Gen. 214, 216 (1987) and authorities cited there; see also Youngstown Steel v. State Bd. of Equal. (1957) 148 Cal.App.2d 205, 208-210.) In this case we are satisfied that Government Code section 9359.04 used the phrase "upon his written application" as a condition to, rather than the time of, retirement.

Under the LRL "retirement" commences when the member begins to draw a retirement allowance. (Gov. Code, § 9351.1.) And no retirement allowance or optional settlement in lieu thereof may be paid to or in respect of any person during any time in which he or she holds office as a legislator. (Gov. Code, § 9359.15.) Thus, in order for a member of the Legislature to be entitled to retirement in mid-term, he or she would have to resign from office. Resignation from the Legislature is a formal matter. It requires that the member submit a written resignation to the presiding officer of his or her house for immediate transmission to the Governor. (Gov. Code, § 1750, subd. (c).) The PERS Board obviously has no authority to accept a resignation of a member of the Legislature. In Government Code section 9359.04 the Legislature did not provide for the retirement of a person who chose not to run upon his written application *and resignation* from the Legislature, as would be required for retirement before the end of a member's term. In fact, the only reference to resignation in Government Code section 9359.04 is to members who left the Legislature to accept another public office. This is a strong indication that the Legislature did not intend to provide for retirement

before the end of the term for which the member was elected when the member chose not to run for reelection.

Walsh also relies upon the word "during" in Govenment Code section 9359.04, as it was used with respect to a reapportionment term. That section provided for retirement of three classes of persons, separated by punctuation marks. These were members of the Legislature whose districts were reapportioned and who (1) were not returned to office, (2) chose not to run, or (3) resigned upon election or appointment to another office. The qualifying word "during" was attached without separation through punctuation to the class of legislators who resigned upon election or appointment to another office. "Generally, a qualifying phrase applies to the word, phrase or clause immediately preceding it, unless context or evident meaning require a different construction." (People v. Cruz (1974) 12 Cal.3d 562, 566.) Under this rule the word "during" would appear to apply only to those members of the Legislature who resigned to accept another office and not to those who were not returned to office or chose not to run for reelection.

Any doubt in the matter is dispelled by reference to the Legislature's expressed intent in enacting Government Code section 9359.04. In section 3, of chapter 1820, of the Statutes of 1971, the Legislature recognized that allowing reapportionment-based retirement encouraged premature retirement and stated that the purpose of Government Code section 9359.04 was to provide for the retention in public service of experienced legislators. This purpose was to be accomplished by permitting members to defer reapportionment-based retirement while remaining in the Legislature. The measure was not intended to

encourage resignation of sitting members of the Legislature in order to obtain its benefits. For all of these reasons we agree with the PERS Board and the trial court that Walsh was not entitled to retire under Government Code section 9359.04 before its repeal.

IV

Walsh contends that he was entitled to retire at the end of his term under Government Code section 9360.11, which was enacted in the 1974 urgency legislation. (Stats. 1974, Second Ex. Sess., ch. 1, § 8, p. 3957.) Section 9360.11 provides: "Notwithstanding any other provisions of this chapter, any member who would have been eligible to retire under Section 9359.01 had it not been repealed because he did not return to office or who would have been eligible to retire under such section had it not been repealed and had he chosen not to run or not been returned to office following the reapportionment of his district shall be deemed eligible for retirement for purposes of Sections 9360.7 and 9361.1 at any time thereafter."

Government Code section 9361.1 is part of article 7 of the LRL, which provides for optional settlements. Under that article a member of the LRL could elect to receive lesser benefits for life in return for a continuation of benefits to his or her beneficiary or estate upon his or her death. (Gov. Code, § 9361.) Under Government Code section 9361.1, any election, revocation, or change in election had to be made before the first payment on account of any retirement allowance. The fifth paragraph of Government Code section 9361.1 provides, in relevant part:

"If a member who is eligible for retirement has elected one of the optional settlements specified in this article, the surviving spouse of such member shall receive the same benefits as such surviving spouse would have received if the date of his death had also been the date of his retirement and if retirement had preceded death. . . . If a member dies without having elected an optional settlement and there is a surviving spouse, he shall be deemed for the purpose of this paragraph to have elected Optional Settlement No. 2. . . . "

Government Code section 9360.7, was enacted subsequent to the provisions for optional settlements and was amended in the 1974 urgency legislation. (Stats. 1974, Second Ex. Sess., ch. 1, § 6, pp. 3955-3956.) Under that section a member of the Legislature who retires for service or disability receives a retirement allowance unmodified by any optional settlement which may have been elected. In the event a member dies after retirement then his or her surviving spouse may elect to receive an allowance equal to one-half of the member's allowance, in which case any optional settlement would not be payable. The third paragraph of section 9360.7 provides, in relevant part: "The surviving spouse of a member who is a Member of the Senate or Assembly and who dies before retirement but after becoming eligible for retirement may elect to receive an allowance under this section. . . . "

Neither section 9360.7 nor section 9361.1 of the Government Code provide criteria for the retirement of a member of the LRL. Rather, both sections provide for certain benefits which may be payable to the survivors of a retired member upon his or her death. In each statute the phrase "eligible for retirement" is used with respect

to a member who has satisfied the relevant retirement criteria but who has not yet retired. That phrase is employed in each statute to provide survivor benefits to the survivors of a member who had satisfied retirement criteria but had not yet retired. Under these circumstances deeming a member "eligible for retirement" for purposes of Government Code sections 9360.7 and 9361.1 could have no meaning with respect to the retirement of the member, since those sections do not provide retirement criteria for the member. Rather, the provisions of Government Code section 9360.11 were obviously intended to preserve survivor and optional settlement benefits for a member who would have been but is not eligible to retire due to the repeal of Government Code section 9359.01.

Walsh asserts that the enactment of Government Code section 9360.11 in the same bill that repealed Government Code sections 9359.01 and 9359.04 was actually a "skillful manipulation of the legislative process" and that neither the press nor the Legislative Counsel realized what had been done.[9] According to this argument, the Legislature repealed early reapportionment-based retirement in appearance only in order to mollify "an antagonistic press and the sour discord of constituents." It then

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[9] Throughout the legislative process the Legislative Counsel consistently advised that Government Code section 9360.11 preserved only the surviving spouse, dependent children, and optional settlement benefits of a member who would have been but is not eligible to retire due to the repeal of Government Code section 9359.01. Walsh asserts that the Legislative Counsel was simply wrong, and that the manipulation of the process was so skillful that even the Legislative Counsel was fooled.

craftily snuck those benefits back into the law by enacting Government Code section 9360.11. We would be loath to ascribe such an unconscionable and Machiavellian purpose to our Legislature and will not do so in the absence of clear language dictating such a result. Since a reasonable reading of Government Code section 9360.11 in conjunction with Government Code sections 9360.7 and 9361.1 does not support, let alone compel, such a bizarre interpretation we will not adopt it.

V

Walsh claims that the state is estopped to deny reapportionment-based retirement benefits to him. He argues that when he was elected to the Legislature and joined the LRL he was informed that reapportionment-based retirement would be available under Government Code section 9359.01. In 1970 his wife of 20 years filed a petition for dissolution of marriage and a final judgment incorporating a property settlement agreement was entered in March 1971. Walsh asserts that during negotiations over the property settlement he was aware that his district might be reapportioned. He further asserts that in the dissolution he gave up his interest in his wife's Shaklee Products business and secured his pension benefits. He thus argues that the state must be estopped from denying reapportionment-based retirement benefits for this reason. The argument is specious.

Estoppel poses a factual question which must be pled and proven in the trial court. (Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc. (1988) 202 Cal.App.3d 921, 930; Green v. Travelers Indemnity Co. (1986) 185

Cal.App.3d 544, 555.) The trial court found against Walsh on this issue and thus on appeal he has the burden not only to point to evidence which might support his claim, but to show that the evidence compelled a finding in his favor. (Rubin v. Los Angeles Fed. Sav. & Loan Assn. (1984) 159 Cal.App.3d 292, 298; McKinney v. Kull (1981) 118 Cal.App.3d 951, 955.) In his appellate brief Walsh makes certain factual assertions but provides no references to the record to support these assertions and makes no effort to show that there is no evidence in the record which would support the conclusion of the trial court. This alone is sufficient reason to reject his claim of estoppel.

In any event, we have read the record and find that it not only does not compel a finding of estoppel, it would not support such a finding. A person who asserts an estoppel must prove (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the true facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intention, actual or virtual, that the latter act upon it and (5) that the party actually was induced to act upon it. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 177, p. 859.) Walsh's showing was glaringly deficient in at least two respects.

First, Walsh failed to show detrimental reliance upon a representation of the state. At the PERS Board hearing, Walsh stated that at the time of his dissolution he was aware of the provisions of Government Code section 9359.01 and that his district might be reapportioned during his next term. He stated that the PERS Board did not advise him that his benefits could be limited under the provisions of former article IV, section 4, and that he was

otherwise ignorant of that constitutional provision. He also stated that the matter of his retirement was discussed between the parties and attorneys during the dissolution. He did not testify that he relied to his detriment upon the possibility of early retirement in accepting the property settlement agreement, nor did he introduce evidence that would support that claim.

Walsh did introduce into evidence his property settlement agreement. In that agreement his wife received a 1966 GTO automobile, a 1965 Volkswagen bus, a portion of the household furniture and furnishings to be agreed upon, total interest in her Shaklee Products distributorship, all monies in financial institutions in her name or the name of the distributorship, her personal effects, a promissory note for $3,000, and a life insurance policy with a face value of $1,000 subject to a lien of $125. Walsh received the family residence, a portion of the furniture and furnishings to be agreed upon, all interests in two corporations -- the Walsh Equipment Company and the Walsh Equipment Rental Company, his legislative retirement, all monies in financial institutions in his name or in the Walsh company names, all furnishings and fixtures in his Sacramento apartment and in his offices in Sacramento and Commerce, California, his personal effects, and an insurance policy with a face value of $2,318 subject to a lien of $262. Walsh agreed to hold his wife harmless with respect to two promissory notes of the Walsh corporations which had been guaranteed by the parties. His wife agreed to hold him harmless from all debts of the Shaklee business. Finally, after 20 years of marriage his wife waived forever any right to seek spousal support. Walsh would have us infer from this

agreement that he waived an interest in the Shaklee business in return for his pension rights with an expectation of early retirement. However, such a claim is certainly not apparent from the face of the settlement agreement and on this record is, at best, pure speculation.

Secondly, in order for reliance upon a representation to support an estoppel, the reliance must be justified, that is, the party asserting the estoppel must show that he was actually and permissibly ignorant of the true facts. Walsh professes ignorance that his benefits could be limited under former article IV section 4. However, we are not here considering an obscure provision in a complicated statutory scheme. Rather, we are considering a provision in the basic organic law of this state; it is a part of the fundamental law which created and defined the rights and responsibilities of the office which Walsh held. We cannot conclude that Walsh could be permissibly ignorant of the fundamental constitutional provisions applicable to his office. Accordingly, we find no support for Walsh's claim of estoppel.

VI

Walsh finally contends that retirement benefits are compensation and that any adjustment in compensation cannot have application until the commencement of the regular session following the next general election after enactment of the adjustment. Former article IV, section 4, contained four paragraphs.[10] The first paragraph provided: "Compensation of members of the Legislature, and

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[10] Article IV, section 4 of the state Constitution was extensively revised by the passage of Proposition 112 at the June 5,

reimbursement for travel and living expenses in connection with their official duties, shall be prescribed by statute passed by roll-call vote entered in the journal, two-thirds of the membership of each house concurring. Commencing with 1967, in any statute enacted making an adjustment of the annual compensation of a member of the Legislature the adjustment may not exceed an amount equal to 5 percent for each calendar year following the operative date of the last adjustment, of the salary in effect when the statute is enacted. Any adjustment in the compensation may not apply until the commencement of the regular session commencing after the next general election following enactment of the statute."[11] (As

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1990, election. As amended by that initiative, subdivision (c) of that section now reads: "The Legislature may not provide retirement benefits based on any portion of a monthly salary in excess of five hundred dollars ($500) paid to any Member of the Legislature unless the Member receives the greater amount while serving as a Member in the Legislature. The Legislature may, prior to their retirement, limit the retirement benefits payable to Members of the Legislature who serve during or after the term commencing in 1967. [¶] When computing the retirement allowance of a Member who serves in the Legislature during the term commencing in 1967 or later, allowance may be made for increases in cost of living if so provided by statute, but only with respect to increases in the cost of living occurring after retirement of the Member. However, the Legislature may provide that no Member shall be deprived of a cost of living adjustment based on a monthly salary of five hundred dollars ($500) which has accrued prior to the commencement of the 1967 Regular Session of the Legislature."

[11] When it was enacted in 1966, former article IV, section 4, contained another paragraph dealing with mileage expenses for travel to attend reconvening following a 30-day recess after a regular session. This paragraph was deleted by a 1972 amendment.

enacted Nov. 8, 1966.) The second and third paragraphs dealt with retirement benefits and the reservation of the power to limit benefits before retirement of members serving during or after the term which commenced in 1967 is in the third paragraph.

We must reject Walsh's contention for several reasons. First, it is too late in the day to assert that retirement benefits are controlled by the "compensation" provisions of former article IV. When the LRL was enacted in 1947, former article IV of the Constitution contained provisions (1) providing that members of the Legislature were permitted to receive no compensation other than that fixed by the Constitution and (2) prohibiting the Legislature from granting any extra compensation or allowance to any public officer, agent, servant, or contractor, after service had been rendered or after a contract had been entered into and performed in whole or in part. (Former art. IV, §§ 23b. 32.) Nevertheless, under the constitutional provision which permitted the Legislature to provide for retirement benefits for employees of the state, the Legislature was permitted, with Supreme Court approval, to establish the LRL and to give it immediate effect for the benefit of sitting members. (Knight v. Bd. etc. Employees' Retirement, *supra*, 32 Cal.2d at pp. 402-403.) In subsequent years the Legislature amended the LRL to provide new and increased benefits literally dozens of times. The amendments were made immediately available to sitting members and in many cases were extended to members who had already completed their service. (See the amendments to the LRL set forth *supra*, on pp. 8-9; see also Gov. Code, § 9360.9, renumbered and amended by Stats. 1963, ch. 2174, § 2,

p. 4563; Lyon v. Flournoy, *supra*, 271 Cal.App.2d at p. 785.) These legislative actions would not have been permissible, and might have to be reconsidered, if we were to now declare that the LRL is subject to the "compensation" restraints of the Constitution.

In the 1966 constitutional revision the provision prohibiting the Legislature from granting extra compensation was retained in article IV, section 17. The first paragraph of former article IV, section 4, dealt with annual compensation of the Legislature. In that section the Legislature was given the authority to adjust its own compensation, subject to a five-percent-per-year limitation. In that paragraph "compensation," "annual compensation," and "salary" are used interchangeably. It is there that the provision for delayed effectiveness of any adjustment in the compensation of the Legislature is found. Since 1966 the Constitution has dealt with legislative retirement in specific provisions separate from the provision for annual compensation. We have previously noted that a qualifying phrase is generally construed to apply to the word, phrase or clause immediately preceding it and not to more remote matters. (People v. Cruz, *supra*, 12 Cal.3d at p. 566.) Additional rules of construction require that we give effect to specific provisions over general provisions (Bilyeu v. State Employees' Retirement System (1962) 58 Cal.2d 618, 626; Robertson v. Willis (1978) 77 Cal.App.3d 358, 365), and that we adopt an interpretation which will effectuate rather than negate the purpose expressed in a measure (Cal Pacific Collections, Inc. v. Powers (1969) 70 Cal.2d 135, 140; In re Marriage of Havens (1981) 125 Cal.App.3d 1012, 1016). In order to adopt Walsh's contention we would be required to reject

long-standing and settled views with respect to governmental retirement systems, exalt remote general constitutional provisions over specific provisions, and eviscerate the Legislature's retained power to limit retirement allowances before retirement of legislators. We decline to adopt such a convoluted construction of the Constitution.

DISPOSITION

The judgment is affirmed. (*CERTIFIED FOR PUBLICATION.*)

SPARKS, Acting P.J.

We concur:

SIMS, J.

RAYE, J.

APPENDIX B

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT
(Filed April 6, 1992)

LAWRENCE E. WALSH

Plaintiff and Appellant

vs.

BOARD OF ADMINISTRATION
OF PERS

Defendant and Respondent

3 Civil
C008704
Sacramento
361434

By the Court:

Appellant's petition for rehearing is denied.

Dated: April 6, 1992

SPARKS, Acting P.J.

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cc: See Mailing List

APPENDIX C

Third Appellate District No. C00B704
S026289

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK
(Filed Jun. 11, 1992)

LAWRENCE WALSH, Appellant

v.

BOARD OF ADMINISTRATION OF PERS, Respondent

Appellant's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

LAWRENCE E. WALSH, Petitioner, v. BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent.	No. 361434 Dept. 28 STATEMENT OF DECISION AND ORDER

This matter came on for hearing on October 27, 1989, before the Honorable Joe S. Gray, Judge of the Superior Court. Barbara Lang Betts, Esq., appeared for petitioner. Margaret J. Hoehn, Senior Staff Counsel, Public Employees' Retirement System, appeared for respondent. Following oral argument, a schedule of supplemental briefing by the parties was ordered by the Court. When this supplemental briefing was completed on December 6, 1989, the matter was submitted. The Court, having considered the administrative record, pleadings, points and authorities, exhibits and oral arguments of the parties, now rules on the issues raised by the petition.

In this proceeding pursuant to section 1094.5 of the Code of Civil Procedure, petitioner, a former California senator, challenges respondent's hearing decision denying him benefits under former provisions of the Legislators' Retirement Law. These former provisions made

retirement benefits available to legislators whose districts were reapportioned during their term of office. The provisions were repealed in October 1974, approximately two months before the effective date of petitioner's retirement.

Petitioner was first elected to the California Senate in November 1966 for a four-year term beginning in January 1967. In November 1970, he was reelected to office for a second term beginning in January 1971 and ending on December 2, 1974. During his second term, petitioner's district was reapportioned.

As a senator, petitioner was a member of and contributed to the Legislators' Retirement System ("LRS" or "system"). This system was established by the Legislators' Retirement Law ("LRL"; Gov. Code § 9350 et seq.) and administered by the Public Employees' Retirement System ("PERS"). (Unless otherwise noted, all further statutory references are to the Government Code.)

By letter dated and mailed on September 30, 1974, petitioner applied to the executive officer of PERS for retirement benefits under section 9359.01, an LRL provision permitting a legislator with four years of service to retire at the end of a term during which the legislator's district was reapportioned.[1] In this letter, petitioner

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[1] Section 9359.01 was added to the LRL in 1965, amended in 1969 and repealed effective October 7, 1974. (Stats.1965, ch. 688; Stats.1969, ch. 1582; Stats.1974, 2d Ex.Sess., ch. 1.) Between 1969 and 1974, the period relevant to this proceeding, section 9359.01 provided:

> "A member of the Senate or Assembly who is not returned to office, or who chooses not to run, when

expressed his intention to retire at the close of his present term, on December 2, 1974.

By letter dated October 15, 1974, the executive officer of PERS notified petitioner that PERS was unable to act on his application for retirement at the end of his current term because section 9359.01 had been repealed effective October 7, 1974. The letter also indicated PERS' determination that petitioner did not presently meet the requirements for any other retirement benefits under LRL provisions.

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the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, or who resigns his office upon election or appointment to another public office during the term in which the boundaries of the Senate or Assembly district, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired, upon his written application to the board, at the conclusion of his current term provided the member is credited with a minimum of four years service.

"A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement as of the day following the expiration of the term of office of the member.

"This section shall not apply to persons first elected to the Senate or Assembly after December 31, 1969."

By letter dated February 10, 1975, PERS staff notified petitioner of the steps which he was required to take to maintain his LRS membership. In addition, the letter suggested that petitioner submit a written statement to protect any rights to retirement benefits that may have vested prior or subsequent to the repeal of section 9359.01. Petitioner followed this suggestion and included such a statement in a letter to PERS dated February 24, 1975.

During 1986, petitioner sought and obtained information from PERS regarding his receipt of retirement benefits pursuant to section 9359 when he became 60 in September 1986. PERS staff advised him that he would be eligible for such benefits in September 1986 in a monthly amount of $464.00. This was less than the monthly amount of $510.40 that petitioner would have received upon retirement in December 1974 if former section 9359.01 had not been repealed. With annual cost of living increases, this monthly amount would have more than doubled by September 1986.

By letter dated August 26, 1986, petitioner notified PERS that he disagreed with the calculation of his monthly retirement allowance beginning September 1986 in the amount of $464.00. Petitioner explained that he had taken the action necessary to obtain retirement benefits under former section 9359.01 when he applied for the benefits by letter dated September 30, 1974, before the repeal of section 9359.01. Petitioner requested a retirement allowance under former section 9359.01, retroactive to his September 30, 1974 letter of application, and an opportunity to appeal the denial of this request to the PERS Board of Administration.

In September 1986, petitioner began receiving retirement benefits under section 9359 at age 60 while proceedings in his appeal were pending before the PERS Board of Administration. Thereafter in 1988, on the basis of facts and documents to which the parties had stipulated, an administrative law judge issued a decision proposing that the board deny petitioner's appeal. The board rejected this proposed decision and held a hearing in the matter in December 1988.

At the December hearing, the board reviewed the evidentiary record, received testimony in support of an estoppel argument by petitioner, and considered whether petitioner was entitled to LRS benefits under former section 9359.01 as well as under former section 9359.04, a statute which was similar to section 9359.01 and which was repealed at the same time as section 9359.01 was repealed.[2]

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[2] Former section 9359.04 was added to the LRL in 1971 and repealed effective October 7, 1974. (Stats.1971, ch. 1820; Stats.1974, 2d Ex.Sess., ch. 1.) The statute provided in pertinent part:

> "In lieu of retirement pursuant to section 9359.01, a member of the Senate or Assembly who is not returned to office, or who chooses not to run, or who resigns his office upon election or appointment to another public office during, *or at any time after,* the term in which the boundaries of the Senate or Assembly district which he represents, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired upon his written application to the board, provided the member is credited with a minimum of four years service and was first elected to the Senate or Assembly prior to December 31, 1969.
>
> "If a member does not retire at the conclusion of the term of office during which the boundaries of his district were altered pursuant to a reapportionment

Following argument by counsel and discussion by board members, the board reached a decision by a vote of 9-3 that incorporated the proposed decision of the administrative law judge and determined that petitioner was not entitled to retirement benefits under former section 9359.01, former section 9359.04, or the doctrine of estoppel. A final board decision with a dissenting opinion was issued on February 6, 1989.

Petitioner filed this action on April 27, 1989, seeking a writ of mandate to compel the PERS Board of Administration to set aside its decision denying him retirement benefits since December 2, 1974, and award him retirement benefits with interest from that date. Petitioner contends that the decision of the PERS board is erroneous in four respects:

1. The board based its decision on the repeal of sections 9359.01 and 9359.04, which unconstitutionally impaired his vested rights to retirement benefits under those statutes.

2. The board erroneously determined that petitioner's retirement was not effective prior to the repeal of former section 9359.04.

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of legislative districts, he shall notify the board in writing within 30 days after the conclusion of that term of his intention to retire pursuant to the provisions of this section at some unspecified future date. . . . " (Emphasis added.)

3. The board erroneously determined that petitioner failed to present sufficient facts to estop PERS from denying him retirement benefits under former sections 9359.01 and 9359.04.

4. The board failed to consider and find that section 9360.11 provided him with retirement benefits comparable to those provided under former sections 9359.01 and 9359.04.

Each of these contentions is individually addressed below.

1. The board properly based its decision on the repeal of sections 9359.01 and 9359.04, which was authorized by article IV, section 4, of the California Constitution and did not unconstitutionally impair any vested right of petitioner to retirement benefits.

The board's decision denied petitioner's application for retirement benefits under former sections 9359.01 and 9359.04 on the basis of a determination that petitioner had acquired no vested rights to benefits under those sections and that the Legislature had authority under article IV, section 4, of the California Constitution to repeal the sections prior to his retirement without violating federal and state constitutional prohibitions against the impairment of contracts. Section 4, part of a ballot initiative approved by the electorate on November 8, 1966, was in effect when petitioner began his senatorial service in January 1967. Its second paragraph provides:

> "The Legislature may not provide retirement benefits based on any portion of a monthly

> salary in excess of 500 dollars paid to any member of the Legislature unless the member receives the greater amount while serving as a member in the Legislature. *The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967.*" (Emphasis added.)

Petitioner contends that the board's decision failed to recognize that his rights to retirement benefits under former sections 9359.01 and 9359.04 were contractual obligations of the state which vested when he took office in January 1967, served almost eight years and applied for retirement at the end of a term during which his district was reapportioned. According to petitioner, article IV, section 4, of the California Constitution did not authorize the elimination of these vested rights by legislative repeal. Rather, petitioner contends that the legislative authority to "limit" a legislator's retirement benefits under section 4 must be read in accordance with case law holding that pension statutes are to be construed liberally in favor of the statutory beneficiaries and case law holding that a public employer may modify an employee's vested rights to retirement benefits only if the employer provides additional comparable benefits approximating the employee's reasonable expectations under the employment contract. Thus, according to petitioner, the legislative authority to "limit" a legislator's benefits under section 4 must be read as an authority to "curtail," "abridge" or "restrict" retirement benefits to those benefits within the legislator's reasonable expectations and

may not be read as an authority to "eliminate" a particular retirement benefit without the addition of comparable benefits.

Under settled California case law, a public employee's retirement rights are contractual in nature and vest in accordance with the provisions of the retirement system in effect when the employee accepts employment. (See *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *Miller v. State of California* (1977) 18 Cal.3d 808, 817; *Lyon v. Flournoy* (1969) 271 Cal.App.3d 774, 779; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-856; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102; *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 701.) Legislative impairment of these contractual retirement rights is prohibited by article I, section 10, of the United States Constitution and by article I, section 9, of the California Constitution unless the impairment is necessitated by an important public purpose. (*Ibid.; Olson v. Cory* (1980) 27 Cal.3d 532, 539, citing *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305-310, and *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 434.)

Absent a compelling public purpose, a public employer may modify vested rights to retirement benefits without unconstitutionally impairing the rights only in two general circumstances. First, the employer may modify vested retirement rights when the modifications are reasonable, *i.e.*, bear some material relation to the theory of the retirement system and its successful operation and provide comparable new advantages to offset any disadvantages imposed by the modifications on employees'

vested retirement rights. (*Betts v. Board of Administration, supra,* 21 Cal.3d at 863-865; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; *Lyon v. Flournoy, supra,* 271 Cal.App.3d at 279-283). Second, the employer may modify retirement rights when the modifications are authorized by basic provisions of the public retirement system in effect when the employee accepted employment and his rights to benefits vested. (*International Assn. of Firefighters v. City of San Diego,* 34 Cal.3d 292, 302-303; *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183; *Pasadena Police Officers Assn. v. City of Pasadena, supra,* 147 Cal.App.3d at pp. 710-711.)

As explained below, this case law on pension rights as well as standard rules of construction establish that article IV, section 4, of the California Constitution was a basic provision of the Legislative Retirement System when petitioner began serving as a senator in January 1967 and authorized the Legislature to repeal particular retirement benefits available to petitioner under the LRS before his retirement on December 2, 1974, without providing him with comparable benefits.

The second sentence of the second paragraph of section 4 (*ante* at pp. 7-8) provides the Legislature with authority to limit a legislator's retirement benefits under the LRS prior to the legislator's retirement as long as the legislator commenced service in 1967, after the electorate's approval of section 4 on November 8, 1966. This sentence, which expressly applies only to legislators commencing service after section 4 became effective, reflects its drafters' awareness of existing case law holding that the pension rights of a public employee vest in accordance with the provisions of the retirement system in

effect when the employee accepts employment and are protected by constitutional prohibitions against legislative impairment unless the provisions of the retirement system authorize the impairment. (See *Wallace v. City of Fresno, supra,* 42 Cal.2d at p. 183; *Kern v. City of Long Beach, supra,* 29 Cal.2d at pp. 852-856.)

The sentence also reflects the drafters' intent to provide the Legislature with the broadest possible authority to limit legislators' retirement benefits without contravening the constitutional prohibitions against the impairment of contracts. On its face, the sentence contains no restriction on the type or extent of the limits which the Legislature is authorized to impose on retirement benefits for legislators commencing service during or after 1967. In particular, the sentence contains no restriction on the Legislature's authority to eliminate particular benefits available to these legislators under the LRS without adding comparable benefits.

This reading of the second sentence of the second paragraph of section 4 is consistent with the ordinary usage and meaning of "limit" to which the Court must first look in construing statutory and constitutional provisions. (See *Lundgren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Under the definitions of "limit" cited by petitioner, for example, section 4 authorizes the Legislature to "curtail," "abridge" or "restrict" the retirement benefits payable to a legislator prior to his retirement if the legislator began serving during or after 1967. These definitions reasonably encompass a legislative authority to eliminate particular, though not all, LRS benefits available to the legislator prior to his retirement. Thus, in petitioner's case, the Legislature eliminated the retirement benefits

available to petitioner under former sections 9359.01 and 9359.04 but left intact the other benefits available to him under section 9359 at a later date, benefits which he began to receive in September 1986.

This reading of the second sentence of the second paragraph of section 4 is also consistent with the purposes of the Legislature drafting it and the voters enacting it – matters that must be considered in determining the legal significance of the sentence. (See *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495.) Section 4, which in its entirety authorizes the Legislature to prescribe by statute its members' compensation, expense reimbursement and retirement benefits, was enacted as part of a major revision of the California Constitution. The California Constitution Revision Commission ("CRC") initially drafted this revision (see CRC, "Proposed Revision of Articles of the California Constitution" (February 1966)); the CRC's proposed revision was then adopted with amendments by the Legislature as Assembly Constitutional Amendment No. 13 of 1966 ("ACA 13"; Stats. 1966, 1st Ex.Sess., res. ch. 139); and ACA 13 was finally approved by the voters as a ballot initiative (Proposition 1-a) at the election of November 8, 1966.

The CRC version of section 4 (numbered by the CRC as section 5) treated legislators' retirement benefits as an element of their compensation. (See "ACA 13", as introduced on March 29, 1966; CRC, "Proposed Revision of Articles of the California Constitution" (February 1966), p. 28.) In a major amendment of section 4, the Senate Committee on Governmental Efficiency added the second paragraph dealing separately and exclusively with retirement benefits. (ACA 13, as amended April 20, 1966, and

May 23, 1966.) The first sentence of this second paragraph tied the level of legislative retirement benefits to the salary of retired legislators, and the second sentence of the second paragraph gave the Legislature express and unqualified authority to limit benefits in the future for legislators commencing their service in 1967.

The second paragraph of section 4 effectively overrode existing provisions of the Legislators' Retirement Law which based the level of benefits payable to retired legislators on the level of current legislative salaries (see § 9359.1) and which would have provided retired and retiring legislators with a major increase in benefits upon the enactment of pending legislation increasing the annual legislative compensation from $6,000 (or $500.00 per month) to $18,000. (Assembly Bill 168 (1966, unpassed).) The second paragraph was apparently added in response to strong concerns by both legislators and members of the public that retired and retiring legislators would receive an unearned windfall if their retirement benefits remained tied to the current level of legislators' compensation. (See Respondent's Exhibits Relating to the Legislative Intent of Article IV, Section 4 of the California Constitution, filed November 22, 1989, Exhibit 7, pp. A-17, A-18, A-39, A-55, A-71, A-76, A-77, A-90, A-91. See also Petitioner's Post Hearing Memorandum filed December 6, 1989, Exhibit C (Analysis of AB 173), pp. 1-3. See *Lyon v. Flournoy, supra,* 271 Cal.App.2d 774, 785-787.)[3]

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[3] The referenced documents are a variety of memoranda by legislators and their staff directly involved in the drafting of ACA 13, memoranda by CRC staff tracking ACA 13 in the Legislature, and several contemporaneous newspaper articles.

The second paragraph was also apparently added in response to strong concerns that the Legislature lacked the power to statutorily alter the retirement benefits of retired and retiring legislators under existing case law and thus had minimal ability to correct anomalies and abuses of the retirement system occurring in the future. (*Ibid.*) In this factual context, it is reasonable to infer that the second paragraph of section 4 was drafted and enacted by the Legislature, not only to prevent a windfall to retired and retiring legislators, but also to provide the Legislature with a general authority to restrict retirement benefits in the future when necessary to control excesses in the system.

Closely coordinated with the addition of the second paragraph to section 4 was the enactment of new provisions of the Legislators' Retirement Law increasing annual legislative compensation to $16,000 beginning January 2, 1967; restricting the monthly salary basis of the retirement benefits payable to legislators whose service ended before 1967 to the $500.00 monthly legislative salary then in effect; restricting the salary basis of the retirement benefits payable to legislators whose service commenced during or after 1967 to their salary while in

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These documents recorded the factual circumstances surrounding the enactment of ACA 13 and are considered by the Court as indicators of the problems and issues that the Legislature was attempting to address in the enactment and, hence, as indicators of the intent of the drafters of ACA 13. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Stanton v. Panish* (1980) 28 Cal.3d 107, 114; *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495-498. Cf. *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587.

office; and imposing an overall ceiling on the retirement benefits payable to legislators whose service commenced during or after 1967, *i.e.*, two-thirds of the salary payable to the legislators at the time of their retirement. (Assembly Bill 173 ("AB 173"; Stats. 1966, 1st Ex.Sess., ch. 163, §§ 2-4. Compare Respondent's Post Hearing Brief filed November 22, 1989, Appendix 1 (Assembly Final History, AB 173), with Respondent's Exhibits Relating to the Legislative Intent of Article IV, Section 4 of the California Constitution, filed November 22, 1989, Exhibit 3 (Assembly Final History, ACA 13). See also Petitioner's Post Hearing Memorandum filed December 6, 1989, Exhibit C (Analysis of AB 173) pp. 1-3.) These new provisions of the Legislators' Retirement Law were obviously intended to implement the requirements of the second paragraph of section 4, and its operation was made expressly contingent upon the adoption of ACA 13 by the electorate. (Stats. 1966, 1st Ex.Sess., ch.163, § 6.) Plainly, the second paragraph served as a basic provision of the retirement system established by the LRL.

When the electorate approved ACA 13 on November 8, 1966, the second sentence of the second paragraph of section 4 set forth in ACA 13 contained no specific restrictions on the type of limitations which the Legislature was authorized to impose on retirement benefits under the LRS. Although the ballot arguments for Proposition 1-a (ACA 13) did not mention the second sentence, it is reasonable to assume that the electorate read the sentence, in accordance with its plain meaning, as a basic provision of the LRS giving the Legislature authority to limit LRS benefits in any way it deemed appropriate including the authority to eliminate particular benefits

prior to the retirement of a legislator who commenced serving during or after 1967. This reading was consistent with the apparent purpose and intent of the Legislature drafting the sentence and, in the absence of evidence that the electorate had reason to understand the sentence differently, is the reading adopted by the Court. (Cf. *Stanton v. Panish* (1980) 28 Ca1.3d 107, 114.)

Furthermore, this reading is corroborated by the legislative history of Assembly Bill 7 ("AB 7"), the bill repealing sections 9359.01 and 9359.04 in October 1974. (Stats. 1974, 2d Ex.Sess., ch.1.) In enacting AB 7, the Legislature expressly stated its intention to apply the repeal of sections 9359.01 and 9359.04 to legislators who had not yet retired but who would be retiring during 1974 (Stats. 1974, 2d Ex.Sess., ch. 1, § 10.), and it drafted the repeal in terms reflecting its authority under section 4 to limit a legislator's LRS benefits prior to the legislator's retirement:

> "The repeal of Sections . . . 9359.01 . . . of the Government Code during the 1973-74 Second Extraordinary Session shall not be construed to affect the benefits of members of the Legislators' Retirement System who retired pursuant to the provisions of those sections prior to January 3, 1967." (*Id.*, § 8.)

Apparently, the Legislature was acting pursuant to analyses of the Legislative Counsel advising that the repeal of sections 9359.01 and 9359.04 without the enactment of comparable retirement benefit provisions was constitutionally permitted pursuant to the Legislature's authority under section 4 except for incumbent legislators who had served prior to 1967. (See Legislative Counsel, Opinion

Letter to Senator Wadie Deddeh (an AB 7 coauthor): Legislators' Retirement System – # 17955 (September 24, 1974); Legislative Counsel, Report on Enrolled Bill AB 7 (October 4, 1974).) Although this understanding by the Legislature of its authority by under section 4 to repeal sections 9359.01 and 9359.04 is not determinative of the scope of its authority under section 4, it is a persuasive indicator of the intent of the prior Legislature which drafted section 4 and the voters who approved it, particularly when, as here, the Legislature's understanding is consistent with the ordinary meaning of the language of section 4 and the history of its enactment. (Cf. *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692-695; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 624-625.)

In sum, at the time that petitioner became a senator, section 4 was a basic provision of the LRS and authorized the Legislature to eliminate or repeal particular LRS benefits prior to petitioner's retirement without adding comparable benefits. (See *International Assn. of Firefighters v. City of San Diego, supra,* 34 Ca1.3d at 302-303.) Thus petitioner's rights under former sections 9359.01 and 9359.04 did not vest, and could not have vested, prior to the effective date of his retirement at the end of his term in December 1974, even though he otherwise met the requirements of these sections (four years of service beginning before 1969 and the reapportionment of the boundaries of his senatorial district). The Court concludes, accordingly, that the repeal of former sections 9359.01 and 9359.04 prior to the effective date of petitioner's retirement did not impair any vested right of

petitioner to retirement benefits under conditions of reapportionment and did not violate any federal or state constitutional prohibition against the impairment of contractual obligations.[4] The board did not err in basing its denial of petitioner's claim for benefits under former sections 9359.01 and 9359.04 on the repeal of these sections.

2. The board properly determined that petitioner did not retire under former section 9359.04 prior to its repeal.

Petitioner contends that he had taken the action necessary to effect his retirement and thereby vest his right to benefits under the terms of former section 9359.04 prior to its repeal on October 7, 1974: he had applied for retirement benefits by letter dated and mailed September 30, 1974.[5] According to petitioner, the board erroneously

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[4] Because the Court concludes that petitioner had no vested contractual right to retirement benefits under former sections 9359.01 and 9359.04, the repeal of these sections did not violate either federal or state constitutional prohibitions against the impairment of contractual obligations. (See *Olson v. Cory* (1982) 134 Cal.App.3d 85, 97-98, fn. 5; *Lyon v. Flournoy, supra,* 271 Cal.App.2d at p. 781.)

[5] Recognizing that this letter of application mentioned only former section 9359.01 and omitted any reference to section 9359.04, petitioner argued during the administrative proceedings that the board could and should excuse the omission pursuant to its authority under section 20180 to correct errors and omissions of any member of a retirement system administered by the board. Without deciding this preliminary matter, the board directly determined the merits of petitioner's claim under former section 9359.04. In this proceeding, accordingly, the Court reviews only the board's determination on the merits.

determined that his retirement was not effective upon his letter of application.

Petitioner bases this contention primarily on language at the end of the first paragraph of former section 9359.04, which states that a legislator "may be retired upon his written application to the board." Petitioner contrasts this language with language at the end of the first paragraph of section 9359.01 stating that a legislator "may be retired, upon his written application to the board, at the conclusion of his current term." According to petitioner, the omission of "at the conclusion of his current term" from former section 9359.04 indicated a legislative intent to make a legislator's retirement effective upon his or her application for benefits.

Petitioner's contention must be rejected in light of the Legislature's stated purpose in enacting former section 9359.04:

> "It is the intent of the Legislature in enacting this act to provide for the retention in public service of experienced legislative leadership.
>
> "Section 9359.01 of the Government Code was enacted during the 1965 reapportionment term. The Legislature recognizes that this section would be activated by the 1971 reapportionment. Therefore, the state is faced with the possibility of a mass retirement in the Legislature on January 1, 1973, and the consequent state retirement costs and the loss of experienced legislative leadership." (Stats.1971, ch. 1820, § 3.)

Thus, the Legislature recognized that a legislator who qualified for retirement benefits under conditions of reapportionment pursuant to former section 9359.01 would be discouraged from seeking reelection and continuing his legislative service by the requirement in former section 9359.01 that he retire "at the conclusion of his current term" or lose the benefits. Based on this recognition, the Legislature enacted section 9359.04 to encourage a legislator qualifying for retirement benefits under former section 9359.01 to continue serving after the term during which his district was reapportioned; under section 9359.04, the legislator could qualify for benefits under conditions of reapportionment "at any time after" the term during which his district was reapportioned and could postpone retirement and receipt of the benefits "to some unspecified future date." The omission of the clause "at the conclusion of his term" from former section 9359.04 was necessary to this legislative purpose; the omission did not indicate that the retirement of a legislator under former section 9359.04 became effective upon his application for retirement.

Petitioner's contention that his retirement was effective under former section 9359.04 upon the date of his application for retirement benefits must also be rejected because it would produce an untoward result inconsistent both with the orderly conduct of legislative business and with the approach of other LRL provisions, such as section 9359, to the matter. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Ca1.3d 1379, 1387, 1392; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 615.) By tying a legislator's effective date of retirement under former section 9359.04 to the date of

his application rather than to the date following the expiration of the legislator's term of office or the date specified for retirement by the legislator in his application, the legislator would have been arbitrarily retired whenever he filed an application, whether it was the beginning, middle or end of his term of office. This arbitrary disruption of legislative business could not have been intended by the Legislature when it enacted former section 9459.04.

Therefore, the Court sustains the board's determination that petitioner did not retire effective September 30, 1974, when he dated and mailed his letter of application for retirement benefits under conditions of reapportionment. The Court concludes that petitioner's right to retirement benefits under former section 9359.04 did not vest prior to the repeal of that statute on October 7, 1974.

3. The board properly determined that petitioner failed to present sufficient facts to estop PERS from denying him benefits under former sections 9359.01 and 9359.04.

Petitioner contended in the proceedings before the board that PERS, the administrator of the LRS, was estopped from asserting the repeal of sections 9359.01 and 9359.04 prior to the effective date of his retirement and thereby denying him retirement benefits under conditions of reapportionment. Petitioner claimed that PERS had distributed to him and other legislators annual reports on retirement benefits under the LRL, including retirement benefits under conditions of reapportionment; that no mention had been made in these annual reports of the potential repeal of these retirement benefits pursuant

to article IV, section 4, of the California Constitution; that he had relied on the representations in the annual reports regarding these benefits in deciding not to seek reelection and in entering into a property settlement with his wife during their divorce in 1971; and that he had sustained injury or losses as a result of this reliance. The board rejected petitioner's contention, stating that petitioner "failed to present the necessary evidence to establish the required factual bases for determining whether the doctrine of promissory estoppel would apply in this matter."

The doctrine of promissory estoppel underlying petitioner's claim before the board required petitioner to prove that he reasonably and foreseeably relied to his injury on a promise made to him by PERS regarding retirement benefits under conditions of reapportionment pursuant to former sections 9359.01 and 9359.04. (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Ca1.2d 240, 249.) The related doctrine of equitable estoppel raised by petitioner in the instant proceeding required petitioner to prove that PERS inaccurately represented or concealed a material fact within its knowledge about the retirement benefits under former sections 9359.01 and 9359.04, *i.e.*, the potential repeal of these sections pursuant to article IV, section 4 of the California Constitution; that PERS intended petitioner to act on this misrepresentation or concealment; that petitioner did not know and lacked the means to readily acquire knowledge of the true facts; and that petitioner had relied to his injury on PERS' misrepresentation or concealment. (See *Lentz v. McMahon* (1989) 49 Ca1.3d 393, 399.)

Whether the Court reviews the evidence in the administrative record under the substantial evidence test

or the independent judgment test, petitioner failed to establish at least some of these basic factual elements of promissory and equitable estoppel. In particular, petitioner failed to establish that PERS had either promised or represented to petitioner that he would receive retirement benefits under conditions of reapportionment. The annual reports by PERS regarding the LRS only advised the Legislature of the current status of the LRS and the current provisions of the LRL; the annual reports gave no indication regarding future changes in LRL provisions or the future availability of retirement benefits. PERS appropriately made no attempt to predict that which was well beyond its administrative responsibilities and a matter of speculation: the scope of future changes in the LRL by the Legislature and the legal propriety of any such changes under Article IV, section 4, of the California Constitution. These were matters of opinion and law that were as much within the actual or constructive knowledge of petitioner, a senator in the Legislature which repealed former sections 9359.01 and 9359.04, as the matters were within the knowledge of PERS.

Further, petitioner failed to establish that he had retired from his service as a senator on December 2, 1974, in reliance on either the annual reports or a letter from PERS staff dated September 12, 1974, responding to his request (before the repeal of section 9359.01 on October 7, 1974) for a calculation of the amount of the benefits that petitioner would receive under conditions of reapportionment if he retired at the end of his current term in December 1974. During his testimony before the board, petitioner presented only conclusory statements that he had relied to his detriment on statements by PERS

regarding his rights to retirement benefits under conditions of reapportionment. The board was entitled to substantially discount the probative value of such testimony in reaching its decision.

In addition, by petitioner's own admission in the verified petition in this proceeding, petitioner decided not to seek reelection to office in early 1974, well before the September 1974 letter from PERS calculating the amount of benefits that he would receive if he retired under conditions of reapportionment in December 1974. This letter, which did not purport to determine petitioner's eligibility for any retirement benefits and which was based on the provisions of the LRL in existence at the time, was not a representation of petitioner's rights to benefits on which petitioner could have reasonably relied – or actually did rely.

Similarly, petitioner failed to establish that he reasonably or actually relied on any promise or representation by PERS with respect to his rights to retirement benefits in reaching a property settlement agreement with his wife during their divorce in 1971. In this agreement, according to petitioner, his wife had released all interest in LRS benefits in return for petitioner's release of all interest in a business operated by his wife. The settlement agreement was reached, however, prior to the reapportionment of petitioner's senatorial district during his second term beginning in 1972. Therefore, the agreement was reached before petitioner had even a conditional right to retirement benfits under former sections 9359.01 and 9359.04, and before PERS could have made any representation regarding his rights to such benefits on which he could have relied.

The Court concludes that petitioner presented insufficient evidence to establish that PERS was estopped from denying him benefits under former sections 9359.01 and 9359.04.

4. Section 9360.11 does not provide petitioner with retirement benefits comparable to the benefits under former sections 9359.01 and 9359.04.

Petitioner contends that the Legislature enacted section 9360.11 as part of AB 7 on October 7, 1974, to preserve the retirement benefits under conditions of reapportionment that would have otherwise been lost upon the repeal of sections 9359.01 and 9359.04 by AB 7. Petitioner explains that members of the Legislature engaged in a series of skilled maneuvers to achieve this result. According to petitioner, even the Legislative Counsel was not aware of these maneuvers and thus incorrectly stated in the Legislative Counsel's Digest for the chaptered version of AB 7 that section 9360.11 provided retirement benefits under conditions of reapportionment *only* for the surviving spouses and dependent children of legislators who would have qualified for benefits under section 9359.01 prior to its repeal.

Petitioner did not raise this contention in the administrative proceedings before the board, and respondent objects to petitioner's raising it for the first time in this proceeding. (See *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021.) Because the contention raises only a question of law and can be resolved without difficulty, however, the Court chooses to consider the matter. (Cf. *Harris v. Alcoholic Beverage Control Appeals*

Bd. (1966) 245 Cal.App.2d 919, 924; *UFITEC, S.A. v. Carter* (1977) 20 Cal.3d 238, 249, fn.2.)

The Legislature added section 9360.11 to the Government Code in October 1974 when it enacted AB 7. (Stats.1974, 2d Ex.Sess., ch. 1, § 8.) Since that enactment, section 9360.11 has provided:

> "Notwithstanding any other provisions of this chapter, any member who would have been eligible to retire under section 9359.01 had it not been repealed because he did not return to office or who would have been eligible to retire under such section had it not been repealed and had he chosen not to run or not been returned to office following the reapportionment of his district shall be deemed eligible for retirement for purposes of sections 9360.7 and 9361.1 at any time thereafter."[6]

By its terms, section 9360.11 preserves retirement benefits that a legislator would have been eligible to receive under former section 9359.01 "for purposes of sections 9360.7 and 9361.1." These referenced sections provide benefits for a legislator's surviving spouse and dependent children, not for the legislator. In addition, the

[6] Section 9360.7 provides that the retirement allowance received by a legislator under the LRL shall not be modified by an optional settlement, *i.e.*, a statutory plan for the payment of a retirement allowance to a designated beneficiary of a legislator after the legislator's death. (See §§ 9361 et seq. (optional settlements).) Section 9360.7 also provides for the payment of a retirement allowance to the surviving spouse of a legislator in specified circumstances. Section 9361.1 specifies the procedure for electing an optional settlement for the payment of a retirement allowance to the legislator's surviving spouse.

first paragraph of section 9360.7 (fn. 6, *ante*) merely precludes the modification of a legislator's retirement benefits, established under *other* provisions of the LRL, by an optional settlement; section 9360.7 does not itself establish or provide for any retirement benefits. Thus the terms of section 9360.11 refute petitioner's contention that the Legislature enacted the section to provide retirement benefits comparable to those under former section 9359.01.

This construction of section 9360.11 is confirmed by its legislative history. As pointed out by the Legislative Counsel's Digest for the chaptered version of AB 7, the Legislative Analyst's Analysis of AB 7 as Chaptered on October 7, 1974, and the Legislative Counsel's Enrolled Bill Report on AB 7 to the Governor, AB 7 added section 9360.11 to the Government Code to preserve benefits for a surviving spouse or dependent children of a legislator who would have been eligible for retirement benefits under conditions of reapportionment but for the repeal of provisions providing for such benefits by AB 7.

Petitioner provides no legislative history to support his claims about the maneuvers of legislators to preserve retirement benefits under conditions of reapportionment in section 9360.11 or to contradict the terms of section 9360.11 which refer only to statutory benefits for surviving spouses and dependent children of LRS members. The court concludes that section 9360.11 does not provide petitioner with a right to the retirement benefits that he would have received under section 9359.01 had it not been repealed.

THEREFORE IT IS ORDERED that the petition is denied. Dated: FEB 27 1990

/s/ Joe S. Gray
JUDGE OF THE SUPERIOR COURT

APPENDIX E

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

LAWRENCE E. WALSH, Petitioner, v. BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent.	CASE NO. 361434 JUDGMENT DENYING PEREMPTORY WRIT OF MANDATE Place: Dept. 28

This matter came on regularly for hearing before the above-entitled court on October 27, 1989, the Honorable Joe S. Gray presiding. Barbara Lang Betts appeared as counsel for petitioner Lawrence Walsh, and Margaret J. Hoehn appeared as counsel for respondent Board of Administration of the Public Employees' Retirement System. Prior to this hearing, the parties, through their respective counsel filed memorandum of Points, and authorities in support of their respective contentions. The administrative record was deemed to have been received in evidence and was examined by the court. Following

oral argument at the October 27, 1989 hearing, a schedule of supplemental briefing by the parties was scheduled by the court. Upon the consent of the parties, it was agreed that any historical information, such as contemporaneous newspaper articles, press releases, committee reports or any other materials which would shed light upon the intent of article IV, section 4 of the California Constitution could be filed by the parties with their supplemental briefs and be received into evidence. The supplemental briefing having been completed on December 6, 1989, the matter having been submitted on that date, the court having considered the administrative record, pleadings, points and authorities, exhibits and oral arguments of the parties, and the court having made a statement of decision which has been signed and filed,

IT IS SO ORDERED that:

1. The peremptory writ of mandate is denied;

2. The alternative writ of mandate issued in this action is discharged;

3. Petitioner shall take nothing by way of his petition; and

4. Each party shall bear their own costs and attorney's fees.

DATED: April 11, 1990

/s/ JOE S. GRAY
JUDGE OF THE SUPERIOR COURT

Approved as to Form:

/s/ Barbara Lang Betts
BARBARA LANG BETTS, Attorney for Petitioner

Prepared By:

MARGARET J. HOEHN
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APPENDIX F

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: LAWRENCE E. WALSH, Respondent.	Case No. 565-20-5312 OAH No. N-30503

DECISION

On February 24, 1988, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Margaret J. Hoehn, Staff Counsel, represented complainant.

Ronald A. Clark and Clarence L. Baker, Attorneys at Law, represented respondent.

Evidence was received and the record was left open for submission of written closing arguments until April 8, 1988. The record was then closed and the matter was submitted.

On or about May 6, 1988, Administrative Law Judge Scott submitted his Proposed Decision to the Board of Administration, Public Employees' Retirement System. On July 20, 1988, the Board rejected the Proposed Decision in accordance with section 11517, subdivision (c) of

the Government Code. The Board determined to decide the case itself and afford the parties the opportunity to submit additional evidence and argument.

On December 14, 1988, in Sacramento, California, a quorum of the Board of Administration, Public Employees' Retirement System, heard the matter. Administrative Law Judge Karl S. Engeman, Office of Administrative Hearings, State of California, presided.

Margaret J. Hoehn, Staff Counsel, represented complainant.

Ronald A. Clark, Attorney at Law, represented respondent.

Evidence was received and after hearing oral argument from the parties, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

Dale M. Hanson, Executive Officer of the Public Employees Retirement System (PERS), filed the Statement of Issues in this matter. Hanson acted in his official capacity. PERS administers the Legislators' Retirement System (LRS).

II

From January 1967 until December 2, 1974, respondent served as a member of the California Senate. His first term of office ended January 1971 and his second term of office ended December 2, 1974. By virtue of this

service, respondent is a member of LRS. Respondent has credit for eight years of service as a legislator under LRS because he was paid through January 5, 1975. This was a result of an amendment in 1972 to Article IV, section 2, subsection (a) of the California Constitution which changed the dates of commencement and conclusion of legislators' terms from early January to early December. The amendment also provided retirement benefits and compensation through January 5, 1975 for affected legislators like respondent.

III

On November 8, 1966, Article IV, section 4, of the California Constitution was adopted by initiative. That article states in pertinent part:

> " . . . The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967."

Respondent Walsh took office after Article IV, section 4 of the California Constitution took effect.

The same ballot initiative which added Article IV, section 4 to the California Constitution, also repealed a former provision which fixed legislators' monthly salaries at $500.00. The initiative authorized the Legislature to adjust the salaries of its own members within certain limits, and made related changes in the method of computing retirement allowances under the Legislators' Retirement System.

IV

Under LRS, members of the Legislature are generally eligible to retire: 1) at age 60 with four or more years of service; 2) at any age with 20 or more years of service; or 3) at any age on a reduced basis with 15 years of service. However, former Government Code section 9359.01, which was added in 1965, amended in 1969, and repealed in 1974, permitted retirement of a legislator at any age with four or more years of service, if retirement was under conditions of reapportionment.

V

From 1969 until its repeal on October 7, 1974, Government Code section 9359.01 stated:

> A Member of the Senate or Assembly who is not returned to office, or who chooses not to run, when the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, or who resigns his office upon election or appointment to another public office during the term in which the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired, upon his written application to the board, *at the conclusion of his current term* provided the member is credited with a minimum of four years service.

> A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement *as of the day following the expiration of the term of office of the member.*
>
> This section shall not apply to persons first elected to the Senate or Assembly after December 31, 1969. (Emphasis added.)

VI

By a letter dated September 30, 1974, which is stamped as having been received on October 4, 1974, respondent notified PERS, and thus LRS, of his intention to retire at the end of his second term in elected office, using the following words:

> It is my intention to retire at the close of my elected term of office. I hereby apply for retirement pursuant to the provisions of Government Code 9359.01.
>
> I chose not to run for office for the term in which the boundaries in my Senate district were reapportioned.

VII

Effective October 7, about a week after the date on respondent's letter but about two to three months before the end of his term in office (depending upon whether you use the December 2, 1974, or the January 5, 1975, date

as the end of his term), Government Code section 9359.01 was repealed by urgency legislation.

VIII

On October 15, 1974, LRS informed respondent by letter that the System would not act on his September 30, 1974 retirement application filed pursuant to Government Code section 9359.01, because the section had been repealed prior to the time he could have retired under the statute. The letter further informed respondent that he did not qualify for retirement under any other statute at that time.

IX

At the time of the repeal of Government Code section 9359.01, respondent protested its application to him. LRS permitted him to keep his appeal rights open. On or about August 26, 1986, respondent filed an appeal with PERS of the decision to deny him the benefits of Government Code section 9359.01. LRS-PERS accepted this appeal as timely. Thereafter, the matter was set for hearing.

DETERMINATION OF ISSUES

I

Respondent seeks to retire pursuant to the terms of Government Code section 9359.01, which was repealed effective October 7, 1974. Section 9359.01 allowed legislators to retire at the end of their current term in office if any of certain conditions regarding reapportionment

occurred. But it did not allow retirement until the end of the term in office and respondent's application for retirement clearly indicates his " . . . intention to retire at the close of my elected term of office." But, unfortunately section 9359.01 was repealed before the end of respondent's term in office and cannot be a basis for his retirement. The California Attorney General has reached a similar conclusion, see 46 Ops.Cal.Atty.Gen. 28 (1965) and 70 Ops.Cal.Atty.Gen. 214 (1987).

II

The mere fact that respondent filed an application for retirement before the effective date of the repeal of section 9359.01 does not cause any benefits to vest or accrue under that section because his retirement could not be effective until the end of his term in office, which was after the effective date of the repeal of that section.

In fact, not only did section 9359.01 require that retirement commence at the end of his term in office but Government Code section 9359.15 prohibited him from drawing a retirement allowance during his term in office.

III

Respondent contends that his right to retirement benefits pursuant to section 9359.01 vested when he filed his application or that the benefits were so substantially earned as to have been vested. But section 9359.01 did not vest any rights. Rather, the benefits under it were of the type that can be modified or limited without the provision of a replacement benefit and without violation of the

constitution's contracts clause because of the language in Article IV, section 4 of the California Constitution which authorizes the Legislature to modify retirement benefits of legislators prior to their retirement. Pursuant to Article IV, section 4, the Legislature limited or curtailed legislative retirement benefits by repealing section 9359.01 prior to respondent's retirement. For further discussion of this point see California Legislative Counsel Opinion No. 17955.

IV

Assuming for the sake of argument that upon his filing of the application, respondent had a vested right to retirement benefits pursuant to section 9359.01, that right was lost upon the occurrence of a contingency which was provided for in the LRS pension statutes when respondent took office. The occurrence of that contingency divested respondent of any rights to section 9359.01 retirement benefits. The contingency was created by Article IV, section 4 of the California Constitution which authorized the legislature to modify legislators' retirement benefits prior to their retirement.

V

Respondent failed to present the necessary evidence to establish the required factual bases for determining whether the doctrine of promissory estoppel would apply in this matter. Since respondent has the burden, his arguments regarding promissory estoppel fail for lack of evidence.

VI

The doctrine of substantial performance is not applicable to this case because the very provisions that create and shape the LRS pension scheme provide for its modification via Article IV, section 4 of the California Constitution. Because the pension scheme is expressly subject to modification, the doctrine of substantial performance, which relates to contracts with set terms, is not relevant.

VII

At the hearing before the Board of PERS, respondent argued that even if he is not entitled to retirement pursuant to Government Code section 9359.01, he is entitled to retirement under Government Code Section 9359.04. The Board rejects this contention.

Government Code section 9359.04 was added by Chapter 1820 of the statutes of 1971. This section, like Government Code section 9359.01, permitted retirement at any age with four or more years of service if retirement was under conditions of reapportionment and if the member was first elected prior to December 31, 1969. However, Government Code section 9359.04, unlike Government Code section 9359.01, permitted a legislator to obtain credit for time served after the term in which a member's district was altered pursuant to a reapportionment for purposes of computing the member's retirement allowance received after qualifying for retirement pursuant to provisions other than this section. Section 9359.04 was repealed by statutes of 1974, second extraordinary section, Chapter 1, page 3953, section 4, effective

October 7, 1974. Thus, section 9359.04 was repealed by the same enactment which repealed section 9359.01.

Government Code section 9359.04 read:

> In lieu of retirement pursuant to Section 9359.01, a Member of the Senate or Assembly who is not returned to office, or who chooses not to run, or who resigns his office upon election or appointment to another public office during, or at any time after, the term in which the boundaries of the Senate or Assembly district which he represents, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired upon his written application to the board, provided the member is credited with a minimum of four years service and was first elected to the Senate or Assembly prior to December 31, 1969.
>
> If a member does not retire at the conclusion of the term of office during which the boundaries of his district were altered pursuant to a reapportionment of legislative districts he shall notify the board in writing within 30 days after the conclusion of that term of his intention to retire pursuant to the provisions of this section at some unspecified future date.
>
> Service after the term in which a member's district was altered pursuant to a reapportionment of legislative districts shall be disregarded for purposes of computing any retirement allowance received as a result of qualifying for retirement pursuant to this section. However, such service shall be credited for purposes of computing the member's retirement allowance received after qualifying for retirement pursuant to provisions other than this section.

> A member who notifies the board of his intention to retire pursuant to the provisions of this section shall pay his contribution rate of 8 percent of gross salary to the Legislators' Retirement System during service after the term in which the boundaries of his district were altered pursuant to a reapportionment of legislative districts.

Respondent urges the Board to interpret Government Code section 9359.04 to have permitted his retirement on the date on which his application was submitted to PERS, before respondent's term of office expired. The Board determines that Government Code section 9359.04, properly interpreted, provided that a legislator could have retired, upon his written application to the LRS, at the expiration of his term of office or some unspecified future date. Government Code section 9359.04 did not permit, as urged by respondent, retirement at any time before the end of a legislator's term of office.

VIII

Having rejected respondent's interpretation of Government Code section 9359.04, it is unnecessary for the Board to reach respondent's related factual contention that his failure to apply under section 9359.04 was the result of inadvertence, oversight, mistake of fact, mistake of law, or other cause which could be remedied at this point by the Board pursuant to section 20180 of the Government Code. In short, even had respondent cited Government Code section 9359.04 in his application for retirement submitted to LRS on September 30, 1974, his retirement could not have been effective until the end of

the term of office at which time that section of law had been repealed.

IX

For the same reasons recited above relating to the repeal of Government Code section 9359.01, the Board determines that the repeal of Government Code section 9359.04 was in accordance with Article IV, section 4, of the State Constitution which authorizes the Legislature to modify retirement benefits of legislators prior to their retirement. The Board further determines that neither the repeal of Government Code section 9359.01 nor the repeal of Government Code section 9359.04, in accordance with the express reservation of authority to do so within Article IV, section 4, of the State Constitution, impaired a contractual obligation of respondent's employing public entity. *International Assn. of Fire Fighters v. City of San Diego* (1983) 34 Cal.3d 292.

ORDER

The appeal of Lawrence E. Walsh is denied. This decision of the Board of Administration is adopted by a vote of nine members in favor of the decision and three members dissenting.

Dated: February 6, 1989

/s/ Bill D. Ellis
President
Board of Administration
Public Employees'
Retirement System
State of California

APPENDIX G

BEFORE THE
BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: LAWRENCE E. WALSH, Respondent.	)	Case No. 565-20-5312 OAH No. N-30503

DISSENTING OPINION

We respectfully dissent from the decision reached by the Board of Administration in this case at the full Board hearing on December 14, 1988. The grounds of our dissent are:

1. That the Board erred in interpreting Government Code Section 9359.04 by specifically requiring that retirement be at the conclusion of respondent Walsh's current term.

2. That the Board erred in failing to remedy respondent Walsh's right to an "in lieu" retirement under Government Code section 9359.04 because of inadvertence, oversight, mistake of fact, mistake of law, which could now be remedied by this Board pursuant to Government Code section 20180.

3. That the Board erred in interpreting Article IV, Section 4 of the California Constitution by construing the word "limit" to be equated with the word "modify" as

the term "modify" is used by the California Supreme Court decisions which authorize a modification of public pension retirement benefits, providing there is a replacement benefit.

4. That because of the Board's error in interpreting Article IV Section 4 of the California Constitution, the respondent Walsh was denied a vested early retirement benefit by the repeal of Government Code Sections 9359.01 and 9359.04 without providing a replacement benefit in violation of the contract clauses in the Federal and State Constitutions.

DISCUSSION

I. Government Code Section 9359.04.

Government Code Section 9359.04 differs drastically from Government Code Section 9359.01. section 9359.04 expressly states in its first clause that it is "In lieu of retirement pursuant to Section 9359.01 . . . " In addition Section 9359.04 does *not* contain the clause "At the conclusion of his current term." Section 9359.04 simply states that a member "may be retired upon his written application to the board."

The Board has erred in interpreting Section 9359.04 to limit retirement at the conclusion of his current term. The legislature intended a different timetable for both sections.

II. Government Code Section 20180

It is undisputed that the board has statutory authority to correct errors and omissions. Government Code

Section 20180 provides that whenever the Board finds that because of inadvertance, oversight, mistake of fact, mistake of law, or other cause, that any action required to be performed by an employee, which should have been performed, the board *shall* perform such action.

It is in the record and undisputed that the staff of the system would have notified respondent Walsh of the "in lieu" provision of Government Code Section 9359.04 had been interpreted to apply to retirement *before* the end of the current term. It is also in the record and undisputed that respondent Walsh would have retired pursuant to Government Code Section 9359.04 if he had been advised of its provisions.

III. California Constitution, Article IV, Section 4

Article IV, Section 4 of the California Constitution provides that the Legislature may prior to retirement, *limit* the retirement benefits payable to members of the Legislature.

"Limit" is a word of art, carefully used by the drafters of this provision in the California Constitution. The word "limit" must be considered against the backdrop of case law interpreting vested rights in public pension plans.

The most articulate decision is contained in the case of *Betts v. PERS Board of Administration* (21 Cal.3d 859, 148 Cal. Rptr. 158; 582 P.2d 61). That case states at page 863:

> A long line of California decisions has settled the principles applicable to the problems herein

presented. A public employee's *pension constitutes an element of compensation,* and a *vested contractual right to pension benefits accrues upon acceptance of employment.* Such *a pension right may not be destroyed, once vested, without impairing a contractual obligation* of the employing public entity. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799].) The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a "substantial or reasonable pension." (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183 [265 P.2d 884].) Moreover, the employee's eligibility for benefits can, of course, be defeated "upon the occurrence of a condition subsequent." (*Kern, supra,* at p. 853.)

However, *there is a strict limitation on the condition which may modify the pension system in effect during employment.* We have described the applicable principles as follows: "*An employee's vested contractual pension rights may be modified prior to retirement* for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. (Citations.) Such *modifications must be reasonable,* and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and *changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.* (Citations.) . . . " (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [287 P.2d 765], italics added.) We recently reaffirmed these

principles in *Miller v. State of California* (1977) 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557 P.2d 970]. (Emphasis added.)

It is in the record and undisputed that respondent Walsh was vested in that he had the minimum of four years of service, and in fact had eight years of service.

The decision by the board does not confine itself to the wording of Article IV Section 4 of the California Constitution. That Section specifically uses the word "limit". That decision of the board, without explanation, interpretation, reasoning, or citation of authority broadens the word "limit" to "modify". The decision blatantly interchanges the words as follows:

Page 5 Paragraph III Line 5 uses "modified or limited"

Page 5 Paragraph III Line 9 uses "modify"

Page 5 Paragraph III Line 11 uses "limited or curtailed"

Page 5 Paragraph IV Line 8 uses "modify"

Page 5 Paragraph VI Line 3 uses "modification"

Page 5 Paragraph VI Line 5 uses "modification"

Page 7 Paragraph XI Line 5 uses "modify"

The careless and indiscriminate use of the broader word "modify" in the decision disregards the narrow scope of the reading of that word, and has inadvertently expanded the authority of the Legislature to "modify" pension benefits. This unsupported interpretation gives the Legislature the power to *eliminate* a pension benefit, rather than the authority to limit a pension benefit, and to do so without a comparable new advantage. The drafters of Article IV Section 4 of the California Constitution did

not have such a dramatic result in mind. It confined its power to "limiting" existing retirement benefits not "eliminating" an early retirement benefit!! Had the drafters of the constitutional amendment intended this result, they would have used the word "modify" instead of the succinct word "limit".

IV. Vested Retirement Benefits

As pointed out above, respondent Walsh was vested for early retirement benefits because of reapportionment. The record is undisputed that he should have been made aware of Government Code Section 9359.04 and that this was the result of a mistake or inadvertence or other cause which must be remedied by this Board.

In any event it is also apparent that the board has over stretched the meaning of the word "limit" to mean "modify". This has resulted in the "elimination" of a retirement benefit without comparable new advantages in violation of the Federal and State Constitution provisions prohibiting the impairment of contract rights.

CONCLUSION

For the above reasons and errors in the Board's decision, this decision must be reversed by the judiciary. Erroneous interpretation of the Legislative Retirement System also impact other public employee retirement systems (see Government Code Section 9353) and will set a precedent in further decision by this board and in the appellate courts.

DATED: January 18, 1989

/s/ Robert F. Carlson

/s/ Charles P. Valdes

/s/ William D. Crist

APPENDIX H

Memorandum
California Public Employees' Retirement System

Date: December 23, 1986
File No.:

To: Charles Conrad, Assistant Executive Officer
Martha Nishi, Manager, LRS

Via: Richard H. Koppes
Chief Counsel

From: /s/ Margaret J. Hoehn
Margaret J. Hoehn
Staff Counsel

Subject: APPEAL OF FORMER SENATOR
LAWERENCE E. WALSH

As you are aware, former Senator Walsh filed an appeal from the System's denial of his request to retire pursuant to Government Code section 9359.01. This section was repealed just prior to former Senator Walsh's requested retirement date. The issue is whether Senator Walsh had a constitutionally vested right under that statute which cannot be divested by the repeal of Government code section 9359.01.

The various individuals involved with Senator Walsh's file originally took the position that the repeal of the statute is effective as to Senator Walsh pursuant to the language in article IV, section 4, of the California Constitution which states in pertinent part:

> "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967."

Martha Nishi has recently requested assistance from the Legal Office in determining how to proceed in this case.

The pertinent language of article IV, section 4, has apparently never been interpreted by the courts, nor by the Attorney General's office. Furthermore, this System does not appear to have ever formally interpreted this section.

Prior to the Legal Office proceeding with Senator Walsh's appeal, we must first determine how PERS wishes to interpret the above cited language of article IV, section 4.

If it is determined that the System wishes to interpret the pertinent language to mean legislators who took office after 1967 do not have vested pension rights, then the repeal of government code as to former Senator Walsh would be effective. However, such an interpretation would potentially have a profound effect on the Legislators' Retirement System. Furthermore, such an interpretation would be contrary to the existing case law which deals with vested rights.

There are several possible interpretations of the pertinent language of article IV, section 4. The pros and cons of these various approaches are set forth in detail in the attached memo.

After you have reviewed the attached memorandum and the various alternatives for proceeding in this case, please contact me so that we can meet to discuss this matter.

MJH:nt

Attachment

cc: Executive Staff

LOGO – PERS

Memorandum
California Public Employees' Retirement System

Date: December 23, 1986
File No.:

To: Richard H. Koppes
Chief Counsel

From: /s/ Margaret J. Hoehn
Margaret J. Hoehn
Staff Counsel

Subject: APPEAL OF FORMER SENATOR
LAWRENCE E. WALSH

Issue: Former Senator Walsh has appealed the System's denial of his request to retire under the provisions of Government Code section 9359.01. This section was in effect at all times he held office with the exception of the last two months, at which time it was repealed pursuant to urgency legislation. The former Senator met all of the qualifications for retirement under this statute prior to its repeal, and he applied for retirement pursuant to Government Code section 9359.01 while it was in effect. The issue is whether the repeal of Government Code section 9359.01 can constitutionally be applied to former Senator Walsh. You have requested that I set forth the alternative positions that the System may take in this case. These alternative positions are set forth in section II of this memorandum.

I. BACKGROUND MATERIAL

A. Legal Background

The Legislators' Retirement Law is contained in the Government Code commencing with section 9350. Pursuant to the sections which govern the Legislators' Retirement System, members of the Legislature are generally eligible to retire: 1) at age 60 with four or more years of service; 2) at any age with 20 or more years of service; or 3) at any age on a reduced basis with 15 years of service. (Secs. 9359 and 9359.16.) However, former Government Code section 9359.01, which was added in 1965, amended in 1969, and repealed in 1974, permitted retirement of a legislator at any age with four or more years of service, if retirement was under conditions of reapportionment. From 1969 until its repeal on October 7, 1974, Government Code section 9359.01 stated:

> "A Member of the Senate or Assembly who is not returned to office, or who chooses not to run, when the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, or who resigns his office upon election or appointment to another public office during the term in which the boundaries of the Senate or Assembly district, respectively, in which he was resident, when last elected to the Senate or Assembly, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired, upon his written application to the board, *at the*

> *conclusion of his current term* provided the member is credited with a minimum of four years service.
>
> "A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement as of the day following the expiration of the term of office of the member.
>
> "This section shall not apply to persons first elected to the Senate or Assembly after December 31, 1969."

On November 8, 1966, article IV, section 4, of the California Constitution was adopted by initiative. That article states in pertinent part:

> " . . . The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967."

The pertinent language of article IV, section 4, was added as part of an extensive partial revision of the State Constitution. In part, this constitutional amendment validated a 1966 statute which substantially increased legislative compensation commencing with the 1967 Regular Session (see Gov. Code sec. 8901) and made related changes in the method of computing retirement allowances under the Legislators' Retirement Law (see Gov. Code sec. 9359.12).

I obtained a copy of the 1966 voter pamphlet to ascertain whether it offered any guidance for interpreting the pertinent language in article IV, section 4, which deals with limiting legislators' retirement benefits. It is silent in this regard.

I could find no cases or Attorney General's opinions which interpret this section of the Constitution. I also found no System approved memorandums which addressed the interpretation of the pertinent language in article IV, section 4. The only System document which I could find which addresses the language at issue in article IV is entitled "Legislation Accomplishing Substantive Changes in Legislators' Retirement Law 1965-1973."

On page 4 of this document it states in pertinent part:

> "The Legislature may, prior to their retirement, limit retirement benefits for members of the Legislature who serve after January 2, 1967. This apparently is intended to avoid impairment as a bar to future changes in the System. This right of the employer would seem to be a part of the "employment contract" of members entering upon office in 1967 and later years. It is possible, however, that since the Legislature has not included provision for such right in the Retirement Law, it has not become a part of the contract. However, this will become an issue in the unlikely event of an attempted reduction of benefits and may be left to court construction at that time."

Government Code section 9359.01 was repealed by chapter 1 of the 1973-74 Second Extraordinary Session. The repeal became effective on October 7, 1974, pursuant to urgency legislation.

A September 24, 1974 transcript of a press release from then Governor Reagan indicates that Government Code section 9359.01 was repealed because of "a storm of protest from the people" over "early retirement 'bonus' provisions" for some members of the Legislature. (News release No. 531.) The press release made it clear that the intent behind the repeal was to prevent members of the Legislature who were then holding term (even though it was only approximately two months from the end of the Senate term), from obtaining the benefits of Government Code section 9359.01.

Furthermore, the Legislative Counsel Digest states as follows regarding the repeal of this section:

> "The repeal would not be applicable to persons who retired under such conditions [conditions of reapportionment] prior to January 3, 1967."

This suggests that the repeal was intended to be applicable to those legislators who had not retired prior to January 3, 1967.

Since the language of Government Code section 9359.01 requires members of the Assembly or Senate to wait until the conclusion of their term to retire, the Legislature apparently felt that the repeal of this statute was a legal method of disfranchising the legislators then holding term. If the repeal of the statute operates as the Legislature apparently intended, not one member of the Senate who held office between 1971 and December 2, 1974 would be eligible for the benefits of former Government Code section 9359.01. The result for these individuals

would be just as if the statute had not been in effect at the commencement of their 1971 terms of office.

I obtained the 1974 enrolled bill file for Assembly Bill 7. This is the bill which repealed Government Code section 9359.01 of the Government Code. A September 24, 1974 Legislative Counsel's opinion is contained in the bill file. That opinion was authored by Gerald Ross Adams, who at that time was a Deputy Legislative Counsel. That opinion states in pertinent part:

> "Section 4 of article IV of the California Constitution (above) provides in part that the 'Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967.' In this regard, the courts have held that retirement rights are determined by the terms of the enactments establishing the retirement plan (see *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 782; *Wallace v. City of Fresno*, 42 Cal.2d 180, 183). While no cases have been decided construing this portion of the Constitution, it is clear that the provision authorizes the Legislature to modify retirement benefits prior to the retirement of members who serve during or after the term commencing in 1967. The courts have defined the term 'limit' as meaning, in its general application, to restrict (*Brown v. Board of Appeals of City of Springfield* 159 N.E. 225, 226) and Webster's Third New International Dictionary defines 'limit,' among other things, as 'to curtail or reduce in quantity or extent.' Since the repeal or amendment of the reapportionment provisions in question need not affect eligibility for retirement benefits pursuant to other provisions of the Legislators'

> Retirement Law, such legislation would be limiting retirement benefits. Accordingly, if the provisions relating to early retirement under conditions of reapportionment are repealed by the Legislature the eligibility for those benefits by members who first served during or after the terms commencing in 1967 and who have not retired would be clearly limited."

On page 6 of this opinion the following conclusion is reached:

> "Accordingly, in our opinion, the repeal of the provisions relating to retirement under conditions of reapportionment would be constitutional. . . . "

B. Factual Background

From January 1967 until December 2, 1974, former Senator Lawrence Walsh served as a Senator. He is credited with eight years of service. This first term of office ended in January 1971 and his second term ended December 2, 1974.

On September 30, 1974 the Legislators' Retirement System (LRS) received Senator Walsh's letter which stated that he wished to retire at the end of his elected term of office pursuant to the provisions of Government Code section 9359.01.

On October 7, 1974, Government Code section 9359.01 was repealed.

On October 15, 1974, LRS informed Senator Walsh by letter that the System would not act on his September 30, 1974 retirement application filed pursuant to Government Code section 9359.01, because the section had been

repealed prior to the time he could have retired under that statute. The letter further informed Senator Walsh that he did not qualify for retirement under any other statute at that time. (As will be discussed below, this may not have been correct.)

II. INTERPRETATION OF THE PERTINENT LANGUAGE OF ARTICLE IV, SECTION 4, OF THE CALIFORNIA CONSTITUTION

The first issue which must be determined is whether pursuant to the pertinent language of article VI, section 4, legislators' retirement benefits were vested rights protected by the contracts clause of the Federal Constitution such that former Senator Walsh's rights to retire pursuant to Government Code section 9359.01 could not be divested by the repeal of that statute.[1]

If the pertinent language in article IV is interpreted to mean that legislators' pension benefits were not vested contractual rights in 1974 when Government Code section 9359.01 was repealed, then an argument exists that the repeal of this section did not violate former Senator Walsh's constitutional rights, since it was within the authority of California legislature to "limit the retirement benefits of members of the legislature . . . "

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[1] The contract clause of the California Constitution was not added until November 5, 1974. (See art. 1, sec. 9.) Thus, the contract clause of the California Constitution was not added until after the repeal of Government Code section 9359.01 and after former Senator Walsh had applied for retirement under that section of law.

However, if it is determined that legislators' pension benefits were in fact vested contractual rights at the time period in issue, it would appear that the repeal of Government Code section 9359.01 during Senator Walsh's term of office (after he had met all of the qualifications of that section and had even applied for retirement pursuant to that section) violated his constitutional rights under the contracts clause of the U.S. Constitution.

According to Martha Nishi, there are several former legislators who were affected by the repeal of Government Code section 9359.01. Furthermore, if the System reaches an interpretation of the pertinent language in article IV, section 4, this interpretation may affect the manner in which the System will apply future additions and repeals in the LRS law to legislators.

You have requested that I set forth the various approaches which the System could take in former Senator Walsh's case:

Alternative #1

Interpret the pertinent language of article IV, section 4, to mean that legislators who took office after 1967 do not have vested contractual rights. This interpretation would be consistent with Gerald Adam's legislative counsel opinion.

If the System took this approach, we would continue to deny former Senator Walsh's request for benefits pursuant to Government Code section 9359.01, and the matter would go to hearing before an administrative law judge.

The following issues should be considered in conjunction with Alternative #1.

First, the conclusion that a legislators' retirement benefits are not vested contractual rights has very drastic and far-reaching consequences for members of the Legislature. It could be argued that this conçlusion should not be accepted unless the language of article IV, section 4, clearly and unmistakably supports such a determination. The language of article IV, section 4, in fact does not clearly or unmistakably indicate that the intent of the section was to prevent legislators' pension benefits from being vested contractual rights.[2] the pertinent language in article IV, section 4, could have stated that legislators' pension rights were neither vested contractual rights within the meaning of the Federal Constitution, or any other provision of law, had that been its intended purpose.

Second, pension legislation is to be construed liberally in favor of the employee or applicant in order to effectuate rather than defeat its avowed purpose of providing benefits for employees and their families. (*Cavitt v. City of Los Angeles* (1967) 251 Cal.App.2d 623, 626; [59 Cal.Rptr. 690, 692].) Rights to pension benefits are valuable property

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[2] On November 4, 1980, by initiative, the People amended article III, section 4, of the Constitution to include the phrase, "Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article I or any other provision of law." Unlike article III, section 4, the pertinent language of article IV, section 4, does not clearly and unmistakably state its purpose and intent.

rights which cannot be taken away by strained construction. (*Ibid.*) Furthermore, all ambiguity should be resolved in favor of the applicant. (*Neeley v. Board of Retirement of the County of Fresno* (1974) 36 Cal.App.3d 815; 111 Cal.Rptr. 841.)

In the instant case, it appears that article IV, section 4, may be subject to more than one possible interpretation. And interpretation that the pertinent language in article IV, section 4, is meant to prevent legislators' retirement rights from being vested contractual rights within the meaning of the Federal Constitution would appear to be contrary to the rule of liberal construction.

Third, an interpretation that a legislator's pension benefit is not a contractual right which vests upon commencement of employment is contrary to the long line of California pension cases which hold to the contrary in regard to all other public employees.[3] It would appear that an interpretation of the pertinent language of article IV, section 4, which harmonized the legislators' pension rights with other public employees' pension rights would be desirable unless there were some clear indication in the law that legislators were meant to be treated differently in this regard. Arguably, no such clear indication exists.

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[3] However, it should be noted that Government Code section 75103.2 states as follows: "The Legislature reserves the right to reduce any benefits applicable to any person who becomes a judge on and after January 1, 1980." This section was added by statutes of 1979, chapter 709, page 2192, section 3. As far as I can determine, this section has never been interpreted by a court or in any Attorney General's opinion.

Fourth, constitutional officers can also be members of LRS. The language of article IV, section 4, does not limit the retirement benefits of constitutional officers. This may raise issues of equal protection.

Alternative #2

Interpret legislators' retirement rights not to be vested rights except to the extent that a member has already qualified as to age and service for retirement. If this approach were taken, once a legislator had qualified for retirement, then nothing could deprive him of his right to retire, subject to the rule of reasonable modifications. In this case, former Legislator Walsh had qualified as to age and service pursuant to the terms of Government Code section 9359.01 prior to its repeal. If this approach is adopted, the System would grant former Senator Walsh the benefit of retirement pursuant to Government Code section 9359.01.

The language at issue in article IV, section 4, states that a legislators' retirement benefits can be limited at any time prior to retirement. Thus, a literal construction of the language of article IV, section 4, would permit a reduction of benefits even after one qualified for retirement. However, pursuant to a liberal construction of the language one could argue that once one qualifies for retirement that the repeal of the statute under which they qualified is not a "limitation" of a right but rather is a complete abrogation of a right.

Alternative #3

Interpret the pertinent language in article IV, section 4 to be a codification of the case law which holds that modification of pension benefits are permissible under limited circumstances. In this regard, the case law holds that pensions are vested rights which may be modified if the modification is reasonable, it bears some material relation to the theory of a pension system and its successful operation, and any resulting disadvantages are accompanied by comparable new advantages.

Again, the language at issue in article IV, section 4, does not clearly support the interpretation that it is simply a codification of the case law which holds pension benefits are vested rights which are subject to modifications under certain limited conditions.

However, this interpretation would be consistent with the body of law which requires liberal interpretation of pension law. This interpretation would also be consistent with the long line of cases which find pension benefits to be vested rights.

If this interpretation is accepted, then former Senator Walsh acquired a vested property interest in the benefits provided by Government Code section 9359.01 during his term of office since it was in effect when he took office, and he satisfied all requirements of that section during his term of office and prior to its repeal. Senator Walsh would be entitled to the benefits of Government Code section 9359.01 because the modifications in this case removed a substantial benefit without providing an alternative benefit. Furthermore, under an impairment of rights analysis, none of the criteria in *Home Building and*

Loan Assn. v. Blaisdell (1934) 290 U.S. 398 [78 L.Ed. 413, 54 S. Ct. 231] appears to have been present when this statute was repealed. (See discussion in Appendix A.)

Alternative #4

Even assuming *arguendo,* that one adopted the view that legislators' retirement benefits could be reduced at will at any time prior to retirement, one could use a restrictive interpretation of the word "benefits."

"Benefit" is currently defined by the Legislators' Retirement Law, Government Code section 9351.2, as "the retirement or survivor allowance granted under this chapter or payment of accumulated contributions or lump sum payments with respect to the death of a member." Thus, the pertinent language in article IV, section 4, could be interpreted to permit limitations in the amount of the allowance or lump sum payment.

One could take the position that anything besides an allowance or lump sum payment could not be limited prior to a legislators' retirement pursuant to the pertinent language of article IV, section 4. This is not a desirable approach in my opinion.

Alternative #5

Request that Senator Walsh waive his right to exhaustion of administrative remedy and proceed directly to Superior Court with a declaratory relief action which requests a finding by the court of the rights and obligations of PERS and Senator Walsh. The System could take a position or simply set forth the alternative positions which

could be taken and request guidance on how to proceed. This is not a desirable approach in my opinion.

Alternative #6

Permit former Senator Walsh to retire on the date of his retirement application pursuant to Government Code section 9359.04 on the theory of mistake, notwithstanding his request to retire under Government Code section 9359.01, at the end of his term of office.

Government Code section 9359.04 was added by chapter 1820 of the statutes of 1971. This section, like Government Code section 9359.01, permitted retirement at any age with four or more years of service if retirement was under conditions of reapportionment and if the member was first elected prior to December 31, 1969. Section 9359.04 read as follows:

> "In lieu of retirement pursuant to Section 9359.01, a Member of the Senate or Assembly who is not returned to office, or who chooses not to run, or who resigns his office upon election of appointment to another public office during, or at any time after, the term in which the boundaries of the Senate or Assembly district which he represents, respectively, are altered pursuant to a reapportionment of legislative districts, may be retired upon his written application to the board, provided the member is credited with a minimum of four years service and was first elected to the Senate or Assembly prior to December 31, 1969.
>
> "If a member does not retire at the conclusion of the term of office during which the boundaries

of his district were altered pursuant to a reapportionment of legislative districts he shall notify the board in writing within 30 days after the conclusion of that term of his intention to retire pursuant to the provisions of this section at some unspecified future date.

"Service after the term in which a member's district was altered pursuant to a reapportionment of legislative districts shall be disregarded for purposes of computing any retirement allowance received as a result of qualifying for retirement pursuant to this section. However, such service shall be credited for purposes of computing the member's retirement allowance received after qualifying for retirement pursuant to provisions other than this section.

"A member who notifies the board of his intention to retire pursuant to the provisions of this section shall pay his contribution rate of 8 percent of gross salary to the Legislators' Retirement System during service after the term in which the boundaries of his district were altered pursuant to a reapportionment of legislative districts."

Section 9359.04 was repealed by statutes of 1974, 2nd Extraordinary Session, ch. 1, p. 3953, section 4, effective October 7, 1974. Thus, section 9359.04 was repealed by the same enactment which repealed section 9359.01.

Senator Walsh entered his second term of office in January 1971, so he was in office while Government Code section 9359.04 was in effect. He also satisfied the requirements of this section prior to its repeal and applied for retirement pursuant to Government Code section 9359.01 while section 9359.04 was in effect.

Government code section 9359.04, unlike Government Code section 9359.01, does not state that the earliest retirement date could be "at the conclusion" of the members "current term." Section 9359.04 provides that if the member does not retire at the conclusion of his term during which the apportionment occurred, he could, upon certain notification requirements, retire at a future date. Nothing in this section prohibited the retirement during the current term of service. A September 19, 1974 memo from Emory Moore, the Chief of Benefits Divison, states that while Government Code section 9359.04 is silent as to when retirement is effective, "we" interpret the section to permit retirement at the end of the term or thereafter.

Government Code section 9359.01 was in existence at the time Government Code section 9359.04 was enacted. Government Code section 9359.01 contained the express provision that the member could retire at the conclusion of his current term. Government Code section 9359.04 does not contain this language. "It is assumed that the Legislature has in mind existing laws when it passes a statute." (*Estate of McDill* (1975) 14 Cal.3d 831, 837 [122 Cal.Rptr. 754].) Furthermore, it is a well established rule of law that pension legislation must be liberally construed in favor of the member in order to effectuate the beneficial purpose of the law. (*Cavitt, supra.*) Thus, it must be presumed that had the Legislature wanted the earliest effective date of retirement pursuant to Government Code section 9359.04 to be the end of a member's current term, the Legislature would have clearly said so.

Thus, it would appear that former Senator Walsh could have retired under Government Code section 9359.04

prior to the end of his office and prior to the repeal of that section had he simply requested a retirement effective date under this section while it was still in effect.

Had former Senator Walsh retired while the statute was in effect, its subsequent repeal would not have altered his rights. The courts have clearly held that once an employee has been retired, he has done everything possible to entitle him to payment of his pension and all conditions precedent to this obligation are fulfilled. The courts have further held that pension benefits may not be changed to the retiree's detriment by subsequent amendment once the pensioner has fulfilled the terms of his employment (see for example, *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 780, 76 Cal.Rptr. 869, 874.) Even the pertinent language in article IV, section 4, states that limitations can be made *prior* to retirement.

Assuming that the calculation of retirement benefits pursuant to Government Code section 9359.04 is the same as it would be pursuant to Government Code section 9359.01, former Senator Walsh would receive the same benefits under Government Code section 9359.04 as he would have received under Government Code section 9359.01. Furthermore, he would be entitled to a much larger allowance pursuant to Government Code section 9359.04 than LRS is offering him pursuant to normal retirement at 60 years of age. Moreover, he would have been eligible to have started receiving that retirement allowance back in 1974. He is only just now eligible for normal retirement.[4] If former Senator Walsh would in fact

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[4] Former Senator Walsh was born on September 8, 1926. Thus, he has recently turned sixty.

have received greater benefits by retiring under Government Code section 9359.04 than under normal retirement, it would appear to have been an error on Senator Walsh's part not to have requested retirement pursuant to Government Code section 9359.04 with an effective date prior to the time of that statute's repeal. It may also have been an error on PERS part not to have advised former Senator Walsh of this option.

Government Code section 20180 is found in the law which governs PERS and it permits the correction of errors.

Government Code section 20180 provides in pertinent part:

> "Whenever, during the employment of any employee by the State, the University, or any contracting agency, or during the membership of a member in this system, or during the time this system remains under any obligation to or in respect to a retired member or his beneficiary, the board finds that, because of inadvertence, oversight, mistake of fact, mistake of law, or other cause, any action required by this part to be taken or performed by an employee, his public employer, a member or beneficiary, or this system was not taken or performed at the time it should have been taken or performed, the board shall take or perform such action, or shall order it to be taken or performed by the person whose duty it was to perform it. If, in any such case, the board finds that (1) the facts and circumstances are such that by adjustments pursuant to Section 20165, payments into or from the retirement fund, and correction of the books, accounts, and records of this system, or any of

> them, the action can be taken or performed as of the date it should have been taken or performed, and the status, rights, and obligations of the employee or member, his public employer, and this system can be made the same that they would have been if the action had been taken or performed at the proper time, and (2) that the purposes of this part will be effectuated if the action is taken or performed as of the date it should have been taken or performed, the board shall take or perform it as of that time, or order it to be taken or performed as of that time, and shall cause the books, accounts, and records of this system to be corrected accordingly, so as to make the status, rights, and obligations of the employee or member, his public employer, and this system the same in every respect that they would be if the action had been duly taken or performed at the proper time."

If the board finds that (1) the facts and circumstances are such that the action cannot be taken or performed as of the date it should have been taken or performed, or that (2) if it is so taken or performed, the status, rights, and obligations of the employee or member, his public employer, and this system cannot be made the same that they would be if the action had been taken or performed at the proper time, or that (3) the purposes of this part will not be effectuated if the action is taken or performed as of the date it should have been taken or performed, the board shall take or perform the action, or to order it to be taken or performed, as of the time the action is actually taken, and the status, rights, and obligations of the employee or member, his public employer, and this system shall be those which result from the action at the time

it is actually taken. Although Government Code section 20180 is found in the PERL, it is equally applicable to legislators' law pursuant to the terms of Government Code section 9353 which states as follows:

> "This system [the Legislators' Retirement System] shall be administered by the Board of Administration of the Public Employees' Retirement System. *The board shall administer this system in accordance with the provisions of the Public Employees' Retirement Law to the same extent and with the same effect as if those provisions are contained in the Legislators' Retirement Law, except for those provisions which provide for the payment of an allowance or other benefit and except for those provisions which conflict with any provision or provisions of the Legislators' Retirement Law."* (Emphasis added.)

Thus, Government Code section 20180 could be applied in this case if one wished to do so since that section does not provide for the payment of an allowance or benefit, nor does it conflict with any provision of the Legislators' Retirement Law.

Before it can be determined whether this approach can be used, Martha Nishi needs to be certain that a retirement allowance payable pursuant to Government Code section 9359.01 would be calculated the same as it would be under Government Code section 9359.04. The dollar amounts should ideally be the same. Ms. Nishi has told me orally that she thinks the calculations would be the same. This needs to be confirmed.[5]

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[5] If the dollar amount under Government Code section 9359.04 is less than it would be under 9359.01, we could still

The problem with this approach is that a retirement allowance cannot be paid to someone who is still receiving a salary. (See 58 Ops.Cal.Atty.Gen. 185.) In the instant case, it appears former Senator Walsh received a salary for his office as a Senator at least through December 2, 1974. This date is after the repeal of both Government Code section 9359.01 and 9359.04. However, it could be argued that the System is estopped from raising this issue since the System arguably should have advised former Senator Walsh that he should have requested a retirement date prior to the repeal of section 9359.04.

If this approach is used and former Senator Walsh is retired on the date of his retirement application under a mistake theory, then the System would not need to address the issue at this time as to what the pertinent language in article IV, section 4 means.

Even if the System does choose to take this approach, the issue as to the meaning of the pertinent language in article IV, section 4, must be addressed sooner or later. Therefore, even if a mistake theory is applied in this case, I suggest that we need to address the interpretation issue.

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offer former Sentaor Walsh retirement pursuant to Government Code section 9359.04 as a settlement of his claim pursuant to Government Code section 20180.

APPENDIX A
SUMMARY OF CALIFORNIA PENSION LAW

A long line of California cases have held and reiterated the principal that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment.

In *Kern v. City of Long Beach* (1947) 29, Cal.2d, 848, 851, [179 P.2d 799, 800,] the court stated:

> "In some states pensions for government employees are treated as gratuities or bounties which can be withdrawn at any time. [Cites omitted.] In California, however, section 31 of article IV of the Constitution forbids gifts of public money to an individual, and this prohibition may have influenced our courts to hold that a pension right constitutes something more than a mere gratuity."[1]

The *Kern* court further noted while an employee does not earn the right to a full pension until he has completed the prescribed period of service, he has actually earned some pension rights as soon as he has performed substantial services for his employer. (*Id.* at pg. 855) In this regard the *Kern* court stated:

> "He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the

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[1] Article IV, section 31 has been renumbered section 6 of article XVI.

> statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights.
>
> "To hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employment. . . . [Citations] It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary." (*Id.* at p. 856.)

The California courts have also recognized that modifications can be made in pension rights under limited circumstances.

In the case of *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 779-780, [76 Cal.Rptr. 869, 873,] the court stated:

> "Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific

terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the System. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but the amount, terms and conditions of the benefits may be altered."

The *Lyon* court further explained the very limited circumstances under which those modifications could be made:

> " . . . The California retirement decisions recognize a residuum of continuing governmental power to adopt limited changes. In brief, modifications affecting the earned pension rights of active employees must be reasonable, related to the theory of a sound pension system, and changes detrimental to the individual must be offset by comparable new advantages." (*Id.* at p. 782)

The *Lyon* court, *supra,* further noted that cases which address the contract clause of the Federal Constitution are consistent with the California retirement decisions in that the federal cases permitted some modifications to a contract, but did not permit contract repudiation or destruction. (*Id.* at p. 782.)

The court in *Olson v. Cory II* (1982) 134 Cal.App.3d 85 stated as follows:

> "A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once

> vested, without impairment of the state's contractual obligation. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, 148 Cal.Rptr. 158, 582 P.2d 614; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 845, 126 Cal. Rptr. 633, 544 P.2d 561; *Dryden v. Board of Pension Commrs.* (1972) 6 Cal. 2d 575, 579, 59 P.2d 104; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855, 179 P.2d 848.)" (*Id.* at pp. 552-553)

Hence, the *Alarcon* court rejected PERS' contention that a retirement benefit could be divested when a judge started an "unprotected term." (*Id.* at p. 553)

In the case of *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695, 702-703, [195 Cal.Rptr. 339], the issue was argued that just as a public employee's compensation might be reduced in the future, pension rights could be reduced prospectively. The *Pasadena* court rejected this contention and stated that such an argument was contrary to the holdings of prior cases which require equal advantages to offset disadvantages and amendments to pension plans. The *Pasadena* court also found that the contention that pension benefits can be reduced in the future is contrary to the California Supreme Court's holding that "By *entering* public service an employee obtains a vested contractual right *to earn a pension on terms substantially equivalent to those then offered by the employer.*" (*Ibid.* Emphasis original.)

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APPENDIX I

PERTINENT STATUTES OF THE LEGISLATORS' RETIREMENT LAW

The following are provisions of the Legislators' Retirement Law during Petitioner's Term of Office not set forth in their entirety elsewhere in the Appendix:

Sec. 9353. Administration. This system shall be administered by the Board of Administration of the Public Employees' Retirement System.

Sec. 9354.1. Administration and Investment. The board has the exclusive control of the administration and investment of the fund, with the same powers and duties, and subject to the same limitations and restrictions that are applicable to the administration and investment of the Public Employees' Retirement Fund. All of the provisions of the Public Employees' Retirement Law applicable to the administration, investment, and custody of the Public Employees' Retirement Fund are hereby made applicable to the Legislators' Retirement Fund, to the same extent and with the same effect as if the Legislators' Retirement Fund were expressly mentioned therein.

Sec. 9355.4. Elective officers; eligibility for membership; election to become a member. Every elective officer of the State whose office is provided for by the Constitution, except judges, may become a member of this system. Every such officer in office at the time this section becomes effective may, within ninety days after the effective date file with the board a written election to become a member of this system. Every such officer elected after the effective date of this section may file an election within ninety days after the commencement of his first

term of office for which he is elected. Upon the filing of the election he becomes a member of this system on the first day of the month following the filing of the election. (Added by Stats. 1949.)

Sec. 9357. Rate. For each year of service rendered after the date this chapter becomes operative each legislator who is a member of this system shall contribute 4 percent of his compensation as a legislator unless he is subject to other contribution provisions of this chapter. Such contributions shall be paid as provided in Section 9357.1. (Added 1947.)

Sec. 9358. State Contributions. The State shall contribute annually to the Legislators' Retirement Fund, an amount, as estimated by the Board of Administration, equal to so much of the benefits to be paid from the fund during that year as is not provided by the accumulated contributions of the members receiving such benefits. (Added 1947.)

Sec. 9358.1. Not an Appropriation. The provisions of section 9358 do not constitute an appropriation of money from the State Treasury. The sum required for state contributions SHALL BE APPROPRIATED in each State Budget Act, OR OTHERWISE. (Emphasis added.) (Added by Stats. 1947.)

Sec. 9359. Retirement age; application for retirement. Upon his written application therefor to the Board of Administration, (a) any member of this system who was a member on the effective date of this amendment who has attained age 60, (b) any member who hereafter becomes a member of this system who has attained age 60 and who is entitled to be credited with four (4) or more years of

service, or (c) any member, regardless of age, who is entitled to be credited with twenty (20) or more years of service, shall be retired, and thereafter shall receive for life the retirement allowance provided in this chapter.

A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement as of the day following the expiration of the term of office of the member.

Sec. 9359.01. Qualifications for Benefits on Reapportionment. Added by Stats. 1965, repealed by Stats.1974, 2nd Ex.Sess., effective Oct. 7, 1974. Previously set forth herein. **See App.** H 99-100; App. A, 9-10; App. D 47-48; and App. F 80-81.

Sec. 9359.02. Credit for Remainder of Term on Reapportionment. Added by Stats. 1967, repealed by Stats.1974, 2nd Ex.Sess., effective Oct. 7, 1974. Gave credit for the full term to which a member of the senate was elected if the full term was not served because of legislative or court reapportionment upon payment of the aggregate contributions due for the time he did not serve at the time of his application for retirement.

Sec. 9359.04. Qualifications for Benefits. Added by Stats. 1971, repealed by Stats.1974, 2nd Ex.Sess., effective Oct. 7, 1974. Previously set forth herein. *See App.* H 112-113; App. A, 12-13; App. D 50-51; and App. F 86-87.

Sec. 9359.18. Increase in allowance under sec. 9359.12 In recognition of increased cost of living allowances payable pursuant to Section 9359.12 with respect to service retirements occurring during the years 1973 and 1974 shall be computed on the basis of 5.5 percent in paragraph (1) of subdivision (a) and subdivision (b) and 3.3 percent in paragraph (2) of subdivision (a).

Sec. 9360.7. Retirement allowance unmodified by optional settlement; election by surviving spouse. Any Member of the Senate or Assembly who after the effective date of this section retires for service or disability shall receive the retirement allowance provided by this chapter unmodified by any optional settlement elected pursuant to Article 7 (commencing with section 9361) of this chapter. . . . "

Sec. 9360.10. Cost of living adjustment; certain allowances not subject to Sec. 9360.9. On or before January 15, 1968, and on or before January 15 of each year thereafter, the amount of any allowances provided by this chapter and not subject to Section 9360.9 shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding fiscal year. The average of the separate indices of the cost of living for Los Angeles and San Francisco, as published by the United States Bureau of Labor Statistics; shall be used as the basis for determining the changes in the cost of living. The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding. (Added by Stats. 1966.)

Sec. 9360.11. Retirement under former Sec. 9359.01 for legislators affected by reapportionment of their district. Notwithstanding any other provisions of this chapter, any member who would have been eligible to retire under Sec. 9359.01 had it not been repealed because he did not return to office or who would have been eligible to retire under such section had it not been repealed and had he chosen not to run or not been returned to office following the reapportionment of his district shall be deemed eligible for retirement for purposes of Sections 9360.7 and 9361.1 at any time thereafter. (Added by Stats. 1974, 2nd Ex.Sess., effective Oct. 7, 1974.)

APPENDIX J

LEGISLATURE VS. EU, 54 CAL.3d 492, 527-534 (1991) RE VESTED RETIREMENT BENEFITS OF INCUMBENT LEGISLATORS

F. IMPAIRMENT OF CONTRACTS

Finally, petitioners maintain that Proposition 140's limitations on the pension rights of incumbent legislators is unconstitutional as an invalid impairment of contracts under the federal Constitution. (U.S. Cons., art I, section 10 ["No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . "].)

As previously indicated, new section 4.5 is added to article IV of the state Constitution to provide that although the state will contribute the employer's share to the federal Social Security program on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," nonetheless "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law . . . , but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security. . . . "

Petitioners assert that, as to incumbent legislators continuing to serve on or after November 6, 1990 (either by reelection to a new term or continuation of a prior

term), Proposition 140 constitutes an improper impairment of their "vested" contractual or statutory right to continued participation in the pension program administered by the Legislators' Retirement System (LRS). (See Gov. Code, Section 9350 et seq.) In petitioners' view, supported by respondent PERS, incumbent legislators who were members of the LRS immediately prior to November 6, 1990, are entitled to continue to earn pension benefits so long as they remain otherwise qualified to receive such benefits through continued state service. Petitioners (not joined in this respect by PERS) assert similar contract claims on behalf of nonincumbent legislators newly elected on November 6.

1. INCUMBENT LEGISLATORS

Petitioners' find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (See *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120, 124 [legislators]; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541 [judges]; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864 [state Treasurer]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814-817 [public employees]; see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [same]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [same].)

Petitioners (joined by respondent PERS) argue that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially

equivalent to those offered by the then-existing provisions of the LRS, and that these benefits included both the primary right to *receive* any vested pension benefits upon retirement (see *City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, 38-39), as well as the collateral right to *earn* future pension benefits through continued service, on terms substantially equivalent to those then offered (see *Carmen v. Alvord* (1982) 31 Cal.3d 318, 325). Although Proposition 140 by its terms assures that incumbent legislators' right to receive vested pension benefits will not be lost or diminished, the measure also purports to terminate their collateral right to accrue additional benefits through further contributions and continued service to the state.

According to petitioners, the applicable principle is set forth in *Miller v. State of California, supra,* 18 Cal.3d at page 17: "[U]pon acceptance of public employment, plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits on his years of service and his highest average salary during three consecutive years." (See also *Olson v. Cory* (1980) 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra,* 21 Cal.3d at p. 863; and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855-856). Similar increased benefits from continued service were provided legislators under the LRS. (See Gov. Code, section 9350.)

In response to petitioners' assertions, respondent EU and intervener first contend that incumbent legislators do not have a vested right under the LRS to continue to accrue pension benefits through continued service. In this regard, they suggest that article IV, section 4, of the state

Constitution precludes legislators from acquiring any vested right to continue to earn pension benefits. We disagree.

Article IV, section 4 of the State Constitution, provides in pertinent part that "*The Legislature* may, prior to their retirement, limit the retirement benefits payable to members of the Legislature . . . " (Italics added.) That provision, seemingly empowering the Legislature to exercise some measure of control over the pension rights of its own members prior to their retirement, may create some uncertainty as to the full amount or exent of a legislator's pension rights during his term of office. But the provision neither states nor implies that these rights are thus deemed inchoate and unprotected from impairment by the initiative process. Significantly, we have never suggested that the mere existence of article IV, precludes legislators from acquiring pension rights protected by the state or federal contract clauses. (Cf. *Allen v. Board of Administration, supra,* 34 Cal.3d at pp. 119-120.)

Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, so long as employees receive "comparable new advantages" in return for any substantial reduction in benefits. (*Olson v. Cory, supra* 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra,* 21 Cal.3d at p. 864; *Allen v. City of Long Beach, supra,* 45 Cal.2d at p. 131.) As we stated in *Olson,* "Although an employee does not obtain any 'absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any

' "changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantage." ' [Citation.]" (27 Cal.3d at p. 541.)

Petitioners correctly observe that the pension provisions of Proposition 140 do not merely modify the LRS pension system; rather they *terminate* that system entirely as to additional benefits accruing for future services. Intervener argues that the "transfer" or "redirection" of pension funds to the federal Social Security system operates as a "comparable new advantage" which justifies the impairment and consequently sustains the measure. Petitioners respond by asserting that every legislator already possessed the right to join the federal Social Security system, that 99 out of 120 legislators were already contributing to that system when Proposition 140 was adopted, and that the anticipated federal benefits will be far less than those provided by the LRS. Neither repondent EU nor intervener has disputed those allegations.

We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4 of the state Constitution. We also conclude that the pension restriction of Proposition 140 must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators.

Respondent Eu and intervener next argue that, assuming an incumbent legislator may acquire such vested rights, a different rule should apply to incumbent legislators who commenced new terms after Proposition 140 became effective. They rely primarily on our decision

in *Olson v. Cory, supra,* 27 Cal.3d 532, which had upheld a statute limiting certain cost-of-living increases in judges' salaries after they commenced new terms of office. As *Olson* held, "A judge who completes one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits then offered by the state for the different term." (27 Cal.3d at p. 540.) Similarly, it is argued, incumbent legislators commencing new terms on or after November 6, 1990, have impliedly agreed to serve under the conditions mandated by the new measure.

Petitioners and respondent PERS contend, however, that pension rights fall into a different category than salary rights. Although a state officer may have no protectible right to continuation of his former salary from term to term, nonetheless on commencing to serve the state the officer thereupon acquired a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to petitioners, that right is not extinguished when one term of office ends and another commences. (See *In re Marriage of Alarcon* (1983) 149 Cal.App.3d 544, 552-553 [hereafter *Alarcon.*]) To hold otherwise, petitioners argue, could unduly penalize public officers who serve elective or appointive terms.

We agree with petitioners. It would be anamalous to hold that a legislator's supposedly "vested" right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive

actual benefits has accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto.

The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan hereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits.

As stated in *Alarcon*, "The state's obligation to pay a specific salary extends to the end of each term of office. There is no promise express or implied the state will continue to pay an existing salary beyond the end of a term. Thus, no contractual rights are impaired if different salary or cost of living differentials are payable during and for a future term. [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligation. [Citations]" (149 Cal.App.3d at p. 552.)

Alarcon is factually distinguishable, for in that cause the affected officer (a state judge who later accepted a federal judgeship) had already acquired a vested, though deferred, right under state law to a full pension *prior* to the enactment of the challenged restriction on pension benefits for persons accepting federal positions. Under such circumstances, the fact the judge served additional terms as a state judge following the adoption of that

restriction could not defeat his previously vested pension rights.

Nonetheless, the principle of *Alarcon* seems controlling here. In the present case, incumbent legislators acquired a vested right to earn increased pension benefits in return for continued service. By analogy to *Alarcon*, their commencement of a new term following adoption of the pension restriction of Proposition 140 would not defeat that vested right.

Alarcon further observed that although vested pension rights could be modified before retirement "to keep a pension system flexible and permit adjustments to accord with changing conditions, such modifications must be reasonable" and may not destroy or impair a vested contractual right to a pension. [Citations.]" (149 Cal.App.3d at p. 553.) As we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990.

Thus, we hold that, under California law, all incumbent legislators acquired a vested right to earn additional pension benefits through continued service, a right which Proposition 140 clearly impairs.

After granting review in this case, we asked for further briefing on the additional question whether the contract clause of the federal Constitution protects the salary

or pension rights of state public officials such as legislators. (See, e.g., *Higginbotham v. Baton Rouge* (1939) 306 U.S. 535, 538-539, rehg. den. 307 U.S. 649 [hereafter *Higginbotham*]; *Dodge v. Board of Education* (1937) 302 U.S. 74, 78-79; *Crenshaw v. United States* (1890) 134 U.S. 99, 105-106; *Butler v. Pennsylvania* (1850) 51 U.S. (10 How.) 402, 416-418.)

In *Higginbotham, supra,* a public officer (commissioner of public parks) was discharged in the middle of his term and sued to recover the balance of his salary for the stated term, asserting a federal contracts clause claim. The high court, in a brief, unanimous opinion (citing earlier cases), denied relief, holding that the contract clause does not protect the tenure assigned to a state's public officers. The court relied on the "familiar principle that 'the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.' [Citations.]" (306 U.S. at p. 538.)

The *Higginbotham (supra,* 306 U.S. 535) principle, though stated in terms of "tenure," extends to matters of compensation of public officers. As stated in *Dodge v. Board of Education, supra,* 302 U.S. at pages 78-79, cited with approval in *Higginbotham,* state legislation fixing the compensation of public officers "creates no contract in their favor and the compensation named may be altered at the will of the Legislature." (See also *Crenshaw v. United States, supra,* 134 U.S. at p. 105, [compensation paid to state public officers is not protected by federal contract clause].)

The applicable principle to be gleaned from *Higginbotham, supra,* 306 U.S. 535, appears to be that a state (or its local subdivisions) has the power at any time to create, alter or abolish state or local public offices, and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. Respondent Eu and intervener argue that if, under *Higginbotham,* a state can terminate a public officer in the midst of his or her term without providing compensation for the remainder thereof, then it would follow that the state likewise can terminate future contributions toward his or her pension, assuming state statutory and constitutional guaranties are satisfied. But as petitioners observe, none of these high court cases involved the special area of vested pension rights, or concerned the rights of persons remaining in office for additional terms.

Although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law.

Higginbotham involved the *tenure* of public officials and the consequences arising from prematurely terminating that tenure. The case did not concern the quite distinct matter of the pension rights of public officials or employees. As we explained in *Miller,* although the Legislature may reduce the tenure of a public employee's position, and thereby shorten his state service, public employee pension rights involve constitutionally protected obligations. "Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for public

employer '[and] cannot be destroyed . . . without impairing a contractual obligation. . . . ' [Citation.]" (18 Cal.3d at 814.)

Decisions of this court have assumed the federal contract clause protects the vested pension rights of public officers. *Olson* and *Betts*, both *supra*, involved public officers (a state court judge and a state constitutional officer, respectively), and those cases concluded, without discussion of the *Higginbotham/Dodge* line of decisions, that the federal contract clause would apply to such persons. (See also *Allen v. Board of Administration, supra*, 34 Cal.3d at p. 119.)

In *Lyon v. Flournoy* (1979) 271 Cal.App.2d 774, appeal dismissed 396 U.S. 274, a case likewise involving the rights of a state public official, the Court of Appeal acknowledged the federal rule limiting federal contract clause protection for discharged state public officers (citing *Dodge v. Board of Education, supra*, 302 U.S. 74), and further observed that the public employee pension decisions of this court (e.g., *Kern v. City of Long Beach, supra*, 29 Cal.2d 848) "plac[ed] earned retirement rights within the shelter of the prohibition against contract impairment, without specific citation of either the federal or state clauses." (271 Cal.App. at p. 781.) The *Lyon* court nonetheless concluded, "Certainly the California pension decisions have never rejected the federal clause as a source of protection. *It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts." (Ibid., italics added [in original].)*

We agree with *Lyon v. Flournoy, supra,* 271 Cal.App.2d 774, that, in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply "too late" to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Propositions 140 are unconstitutional under the federal contract clause as applied to pension rights of those persons. . . .

LUCAS, C.J.

WE CONCUR: PANELLI, J., KENNARD, J., ARABIAN, J., BAXTER, J., GEORGE, J.

CONCURRING AND DISSENTING OPINION BY MOSK, J. AT PAGE 536

I concur in the judgment insofar as it invalidates Proposition 140's purported restrictions on the retirement benefits of incumbent legislators. . . .

APPENDIX K

EXCERPTS *HITTLE v. SANTA BARBARA COUNTY EMPLOYEES RETIREMENT ASSN.* 39 Cal.3d 374 (1985)

The California Supreme Court independently weighed the evidence to conclude that Hittle did not knowingly waive his right to disability retirement at the time he withdrew his retirement contributions, primarily because Respondent did not fulfill its fiduciary duty to disclose to him this option. The Board had not advised Hittle that any additional administrative review procedure was available to him. There was no valid waiver of the right to apply for disability retirement (*Id, supra,* 389):

> " . . . We conclude that there is no substantial evidence to support the trial court's finding that Respondent adequately informed Hittle of the existence of his right to apply for disability retirement and that Hittle was therefore apprised of this right when he withdrew his retirement contributions. Accordingly, we conclude that Hittle's withdrawal of his retirement contributions cannot be deemed to constitute a valid waiver of his right to apply for disability retirement.
>
> " '[I]t is settled law in California that a purported 'waiver' of a statutory right is not legally effective unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation.' (*Bauman v. Islay Investments* (1973) 30 Cal.App.3d 752, 758, fn. omitted.) 'The first requirement of any waiver of statutory or

constitutional rights, of course, is that it be knowingly and intelligently made.' ([Citations.] ['the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived']; ['One can waive only that of which he is aware and cannot waive that of which he is ignorant'].)

" 'The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' [Citation.] This is particularly apropos in cases in which the right in question is one that is 'favored' in the law. . . . ' " [Citations.] "The right to a pension is among those rights clearly 'favored' by the law."

There was no substantial evidence to support the trial court's finding that Respondent had placed Hittle on 'specific notice' of the option for disability retirement. It could not be said that it satisfied its fiduciary obligation to adequately inform Hittle of his membership options upon termination of his employment.

"An employee who serves under a pension plan acquired a vested contractual right to a pension. (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183.) 'A pension plan offered by the employer and impliedly accepted by the employee by remaining in employment constitutes a contract between them, whether the plan is a public or private one, and whether or not the employee is to contribute funds to the pension. [Citations.] The continued employment constitutes consideration for the promise to pay the pension, which is deemed deferred compensation. [Citation.]' (*Hannon Engineering, Inc. v.*

Reim (1981) 126 Cal.App.3d 415, 425.) As a result, '[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits . . . and the trustees must exercise *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations omitted.]' (*Ibid*, original italics.)" (*Id, supra*, 392.)

"The SBCERA officers, by the acceptance of their appointment, are voluntary trustees, within the meaning of Civil Code sections 2216 and 2222 of the retirement plans available to the beneficiary-members of the Association. (Cf. *Hannon Engineering, Inc. v. Reim* .(1981) 126 Cal.App.3d at pp. 425-426.) As such, the SBCERA officers are charged with the fiduciary relationship described in Civil Code sec. 2222 in all matters connected with his trust, a trustee is bound to act in the highest faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.'

"As this court has previously noted, '[i]n the vast development of pensions in today's complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises toward the pensioner a fiduciary duty of good faith and fair dealing.' (*Symington v. City of Albany* (1971) 5 Cal.3d 23, 33.)" (*Id, supra*, 393.)

"This fiduciary relationship is judicially guarded by the application of Civil Code sec. 2235, which provides that '[all] transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' " (*Id, supra,* 393)

"With these considerations in mind, we conclude that SBCERA did not fulfill its fiduciary duty to Hittle to deal fairly and in good faith.[12] The means by which SBCERA sought to inform Hittle of his options in disposing of his retirement contributions are tantamount to the misrepresentation and concealment, however 'slight' prohibited by Civil Code sec. 2228. . . . "

"Fn. 12. SBCERA must meet its fiduciary obligation to fully inform its members of their options in obtaining retirement benefits notwithstanding the extent of the Associations' knowledge of each member's particular situation or entitlement. Nonetheless, the failure to satisfy this obligation is particularly egregarious where the Association is on notice that a member may meet the qualifications to apply for a specific type of benefit." (*Id, supra,* 393.)

" . . . It is not this court's intention to impose unreasonable obligations upon the trustees of a pension trust. Ordinarily when an employee becomes a member of a pension plan he is provided with a booklet or other materials describing the plan in some detail. If the booklet fully and fairly describes the plan and its various options and procedures, and copies are

made available, the obligation of the trustees toward a terminating employee may be satisfied by appropriate reference to the booklet itself, supplemented by a provision of forms pertaining to all available choices. (Cf. fn. 10, *ante*.)" (*Id, supra,* 394.)

"Fn. 10 . . . Evidence relevant to the particular fiduciary obligation at issue here – SBCERA's duty to fully inform Hittle of his retirement options – was fully presented to the trial court. The central issue in this case – whether Hittle's decision to remove his retirement contributions constituted a valid waiver of his right to apply for disability retirement – necessarily involves a determination whether Hittle was fully informed of his retirement options: the two are flip sides of the same coin. SBCERA was therefore on notice that it should present at trial all evidence pertaining to this issue, and it is a logical assumption that SBCERA did so. Surely, had SBCERA given Hittle a handbook of rules or bylaws when he became a member of the retirement association which clearly set forth Hittle's retirement options, SBCERA would have presented this evidence at trial. The SBCERA by-laws which are contained in the trial record contain no reference to the retiree's options; nor was there any indication in the materials sent Hittle by SBCERA that such a reference was available. (CF. fn. 13, post.) SBCERA makes no assertions to the contrary in its substantive and complete response to Hittle's fiduciary duty contention before this court.

"Moreover, the facts presented which pertain to the issue of SBCERA's fiduciary duty to Hittle, the contents of the two letters Hittle

received from SBCERA following the termination of his employment--are undisputed. Accordingly, while the Court of Appeal was not compelled to consider the issue on rehearing" [Citations omitted.], "whether SBCERA met its fiduciary obligation to fully inform Hittle of his retirement options is a question of properly considered by this court." (Fn. 10, *Id, supra,* 391-392.)

APPENDIX L

EXCERPTS PERS' ARGUMENT IN *LEGISLATURE V. EU* RE VESTED RETIREMENT BENEFITS OF INCUMBENT LEGISLATORS

The following are excerpts of PERS' advocacy *Legislature v. Eu* 54 Cal.App.3d 492, 527-534, in the Return of Respondent Board of Administration of PERS to Alternative Writ of Mandate in Supreme Court Case No. S019660. On Page Two they assert:

> " . . . Article IV, Section 4 of the Constitution reserves solely to the legislature the power to limit legislators' pension rights. As Section 4.5 (proposition 140) is not an enactment by the Legislature, *nor a mere limitation, but rather a total elimination of rights, it cannot be upheld under the Contract Clause as an exercise of the power reserved to the State.*" (Underlining in the original.)

And on Pages 5-7:

> "As a fiduciary for the LRS, the Board has standing to protect the interests of the LRS beneficiaries. The Constitution defines the LRS as a trust fund and the Board as its trustee.
>
> "The Constitution requires the Board to administer the LRS solely in the interests of the beneficiaries and protect those interests and defend them against outside attack.

And on Page 8:

> "Pension rights, unlike other terms of public employment, which are purely statutory, arise from contract and thus are protected from impairment by the Contract Clause. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853; *Carmen v. Alvord* (1982) 31 Cal.3d 318, 325 & n. 4.

"The Contract Clause protects the "reasonable pension expectations" of members of the LRS, which are defined by the terms of the contract between the State and LRS members set forth in the LRS."

And on Page 9:

"HOWEVER, LEGISLATORS WHO WERE MEMBERS OF THE LRS BEFORE THE NOVEMBER 6, 1990 ELECTION STAND ON A DIFFERENT FOOTING; WHEN THEY FIRST TOOK OFFICE ONE OF THE BENEFITS PROMISED THEM WAS THE OPPORTUNITY TO EARN A PENSION. THE PROMISES MADE BY THE STATE TO THESE LRS MEMBERS BEFORE THE ENACTMENT OF SECTION 4.5 DEFINED THE MEMBERS' VESTED RIGHTS – RIGHTS PROTECTED FROM IMPAIRMENT BY THE CONTRACT CLAUSE." (Emphasis added.)

"Through the LRS, the State made two types of promises to LRS members: First, it promises that so long as they continued to serve in the Legislature and make the required contributions, they could earn the right to benefits payable in the future. It promises members that after four years of service they would earn the right to a pension upon satisfaction of retirement and age contingencies; that after eight years they would earn the right to health benefits upon retirement; THAT AFTER SIXTEEN YEARS THEY WOULD EARN THE RIGHT TO EARLY RETIREMENT; and after twenty years they could retire at any age with no pension reduction. . . . (Emphasis added.)

"*Second*, after members satisfied the service and contribution requirement of the LRS, the

State promised them that upon retirement the benefits earned would be paid in full."

And on Pages 17-18:

"Petitioners whose future expected benefits under this pension contract have been reduced by Section 4.5 are in a similar position to the plaintiffs in *Babbett, United Firefighters* and *Abbott*. Petitioner Dan Hauser would have had eight years of service credited toward his pension as of January 1, 1991, and would then have been eligible for health benefits upon retirement. His right to these benefits has been destroyed by Section 4.5, as well as his right to earn a larger monthly pension payment. Petitioner Gary Hart WAS ELIGIBLE FOR EARLY RETIREMENT BENEFITS AS OF NOVEMBER 6, 1990, SUBJECT TO A REDUCTION IN BENEFIT AMOUNT UNDER SECTION 9359.16, BECAUSE HE HAD MORE THAN 16 AND FEWER THAN 20 YEARS OF SERVICE. HIS RIGHT TO EARN EARLY RETIREMENT WITH FULL BENEFITS HAS BEEN DESTROYED BY SECTION 4.5, AS WELL AS HIS RIGHT TO EARN A LARGER PENSION PAYMENT REGARDLESS OF HIS AGE AT RETIREMENT." (Exhibit 11) (Emphasis added.)

Supreme Court, U.S.
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No. 92-635

In The

Supreme Court of the United States

October Term, 1992

LAWRENCE E. WALSH,

Petitioner,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITIONER'S SUPPLEMENTAL BRIEF

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LAWRENCE E. WALSH,

Petitioner,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITIONER'S SUPPLEMENTAL BRIEF

I. RESPONDENT BOARD OF ADMINISTRATION OF PERS FILED A PETITION ON OCTOBER 16, 1992, NO. 92-678 ADVOCATING PENSION RIGHTS IN CALIFORNIA ARE PROTECTED BY THE CONTRACT CLAUSE CONTRARY TO THEIR POSITION HEREIN

Subsequent to the filing of the petition herein on October 8, 1992, the Respondent on October 16, 1992, filed a Petition for a Writ of Certiorari to the Court of Appeal of California, Third Appellate District: *The Board of Administration of the Public Employees' Retirement System of the State of California, et al., Petitioners, v. Pete Wilson,*

Governor of the State of California, et al., Respondents, No. 92-678. The opinion of the California Court of Appeal reported at 6 Cal.Reptr. 2d 77 was cited as *Claypool, et al., Petitioners, v. Wilson, The Board of Administration of the Public Employees' Retirement System of the State of California, et al., Respondents* (hereafter *Claypool*). PERS is the common party in the *Walsh* and *Claypool* cases with similar issues, and yet it has taken contrary positions in the two.

By letter, respondent herein has waived the right to file a brief in opposition to Walsh in accordance with Supreme Court Rule 15.5. Briefs and arguments advanced in the lower courts by PERS were based on the theory that Walsh did not have a vested right to the statutory benefits in effect during his rendition of service protected under the Contract Clause of the United States Constitution. PERS further asserted and the Courts' held that specific retirement benefits could be destroyed, completely abrogated and eliminated based on Article IV sec. 4 of the California Constitution which provided: "The Legislature may, prior to their retirement, *limit* the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." (Emphasis added) As long as any pension benefit remained although not payable until twelve years later and substantially reduced, a contract was not impaired according to PERS and the Appellate Court. Walsh has had four separate and distinct pension rights eliminated and destroyed, not capped or limited.

In *Claypool* PERS asserts that "The fact that the right to receive a benefit is subject to a condition that might ultimately cut off payment at some future time does not

change its vested character . . . " (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749. In *Walsh* based on Art. IV, sec. 4, PERS argued and the Courts' held that his pension rights were not vested and therefore not protected by the Contract Clause.

In *Claypool* a lower inflation benefit was substituted for another inflation benefit. PERS argues that the modification was a violation of vested rights citing *Betts v. Board of Administration PERS* (1978) 21 Cal.3d 859, 863 ("a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing entity"). Thus, the *Claypool* retirees are suffering a reduction in their inflation benefit which PERS rightfully argues is an impairment of contract. Contrast the impairment which Walsh has suffered; loss of his early reapportionment retirement benefit; loss of the cost of living increase from 1974 to 1986; loss of medical and health benefits; and a special benefit for those retiring in 1974. PERS' position in these two cases before this court is absolutely incongruous.

In PERS' petition filed with your Court, PERS alleges that fund trustees have the legal obligation to perform their duties solely in the interest of plan beneficiaries. In *Walsh* they have violated their fiduciary duty to advise, inform and protect him at every turn.

II. YOUR COURT HAS RECENTLY AGREED TO HEAR TWO PENSION FUND CASES REGARDING RETIREES AND EMPLOYEES UNDER PRIVATE PENSION PLANS; PUBLIC RETIREES AND EMPLOYEES NEED THE PROTECTION OF THIS COURT IN ACCORDANCE WITH THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

After Walsh's petition had gone to the printers, your honorable Court on October 5, 1992, agreed to hear *Mertens, et al., v. Hewitt Associates,* No. 91-1671, and *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.,* No. 91-1677. Both of these are pension cases involving private pension plans covered by ERISA.

The Mertens case, is particularly pertinent to some of the issues raised herein concerning the duties and obligations of a pension plan fiduciary. The U.S. Solicitor General filed an amicus curiae brief supporting the retirees' brief, and asking you to end "a persistent and widening conflict among the circuits."

The employees and retirees of private pension plans have been protected by Congress by the enactment of ERISA and your decisions interpreting it thereafter. Public employees and retirees of defined benefit plans were denied the specific protections and benefits of ERISA, and must seek your protection under the United States Contract Clause. The need to affirm and clarify the affirmative duty of the fiduciary of a public pension trust to advise, and inform and protect its beneficiaries is paramount to the welfare and peace of mind of hundreds of thousands of public employees and retirees.

CONCLUSION

Petitioner again urges this Court to grant the petition for writ of certiorari and reverse the judgment of the lower court.

DATED: November 3, 1992.

Respectfully submitted,

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